

UNIVERSITÉ DE GENÈVE
INSTITUT UNIVERSITAIRE DE HAUTES ÉTUDES INTERNATIONALES

THE CONCEPT OF WAR IN CONTEMPORARY HISTORY AND INTERNATIONAL LAW

THÈSE

PRÉSENTÉE A L'UNIVERSITÉ DE GENÈVE
POUR L'OBTENTION DU GRADE DE DOCTEUR ÈS SCIENCES POLITIQUES
PAR

LOTHAR KOTZSCH
D'ALLEMAGNE

THÈSE N° 105

EN VENTE CHEZ
LIBRAIRIE E. DROZ
8, RUE VERDAINE
GENÈVE

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La Commission Mixte, composée des Doyens des Facultés de Droit, des Lettres, et des Sciences économiques et sociales, et du Directeur de l'Institut Universitaire de Hautes Etudes Internationales, sur le préavis de M. Paul GUGGENHEIM, professeur à l'Université et à l'Institut Universitaire, et de MM. Maurice BOURQUIN et Hans WEHBERG, professeurs à l'Institut, autorise l'impression de la présente thèse, sans entendre par là exprimer d'opinion sur les propositions qui y sont énoncées.

Genève, le 30 décembre 1955.

Pour la Commission Mixte :

JACQUES FREYMOND,
Directeur de l'Institut Universitaire.

Thèse N° 105.

*A Monsieur et Madame Léopold Gautier
Grange-Canal*

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PART II

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ABBREVIATIONS

A.D.	Annual Digest and Reports of Public international Law Cases. Being a selection from the decisions of international and national courts and tribunals. 1919-
Acta Scandinavica	Acta Scandinavica Juris Gentium (Nordisk Tidskrift for International Ret).
AJIL	American Journal of International Law.
Annuaire	Annuaire de l'Institut de Droit International.
ArchivöR	Archiv des öffentlichen Rechts.
ArchivVR	Archiv des Völkerrechts.
AS Proceedings	Proceedings of the American Society of International Law.
BYB	British Year Book of International Law.
CIJ	Cour internationale de Justice; International Court of Justice.
CLP	Current Legal Problems.
Clunet	Journal du Droit International.
Cmd.	Command Papers, Cmd. 1 — (1919-).
Grosse Politik	Die Grosse Politik der europäischen Kabinette, 1871-1914.
Grotius Transactions ...	Transactions of the Grotius Society, London.
Fontes	Fontes Juris Gentium. Series B; Section 1; Tomus I; Pars 2. Digest of the Diplomatic Correspondence of the European States. 1856-1871.
FW	Die Friedenswarte. Blätter für internationale Verständigung und zwischenstaatliche Organisation.
Guggenheim Lehrbuch ..	Lehrbuch des Völkerrechts. Basel. 1948/50, 2 vols.
Guggenheim Traité	Traité de droit international public. Genève. 1953, 1954, 2 vols.
ILQ	The International and Comparative Law Quarterly.
IMT	International Military Tribunal.
IMT (green series)	Trials of War Criminals before the Nuremberg Military Tribunals. Under Control Council Law No. 10. Washington 1950. 15 vols.
IMT (blue series)	Trial of the Major War Criminals before the International Military Tribunal. Nürnberg 1947-1949.
IMT (Proceedings)	The Trial of the German Major War Criminals. Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany. 22 vols. London 1946 ff.

IMT (Protocols)	Ämtliche Protocolle der Prozesse vor den US-Militärtribunalen in den Fällen I bis XII in deutscher und englischer Sprache (hektographiert). Quoted from " <i>Die Rechtsprechung der Nürnberger Militärtribunale, bearbeitet von Kurt Heinze und Karl Schilling. Bonn 1952</i> "; referring to the paragraph numbers therein.
JahrbuchiaÖR	Jahrbuch für internationales ausländisches und öffentliches Recht.
L.J.	Law Journal, for instance, Cambridge L.J.
LoN	League of Nations.
LQR	Law Quarterly Review.
NedTIR	Nederlands Tijdschrift voor Internationaal Recht.
O.J.	Official Journal.
Oppenheim-Lauterpacht IntL	International Law. London. 7th ed. 1948/52, 2 vols.
PCIJ	Permanent Court of International Justice.
Pravo	Sovietskoye Gossodarstvo i Pravo.
RdC	Recueil des cours de l'Académie de droit international.
RDI	Revue de droit international.
RDILC	Revue de droit international et de législation comparée.
REDI	Revista española de derecho internacional.
Rep. ILA	Report of the International Law Association.
Rev. I. Croix Rouge	Revue Internationale de la Croix Rouge.
RevHell	Revue hellénique de droit international.
RGDIP	Revue générale de droit international public.
Rivista	Rivista di diritto internazionale.
SJIR	Schweizerisches Jahrbuch für internationales Recht.
State Papers	British and Foreign State Papers.
War Crime Reports	Law Reports of Trials and War Criminals. Selected and prepared by the United Nations War Crimes Commission. 15 vols. London 1947-1949.
World Affairs	Yearbook of World Affairs.
ZADR	Zeitschrift der Akademie für deutsches Recht.
ZaöRuV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht.
ZfV	Zeitschrift für Völkerrecht.
ZöR	Zeitschrift für öffentliches Recht.

INTRODUCTION

I

The present investigation of the concept of war at international law has been carried out at a time when the Institut de Droit International in its attempt to classify the laws of war has expressly adopted the criterion that "the laws of war can be considered neither as rules derived from general principles of law nor as a coherent system of logic".¹ The Institute's criterion must be respected by any writer whose study of the regulation of war seeks to reassemble what remains of the traditional laws of war rather than to add to the existing body of controversial dogma.

Formerly legal monographs on the concept of war used to approach the subject by analysing the doctrinal definitions of 'war', which were generally confronted 1) with one another; 2) with the legal status of reprisals; and 3) with a few instances of State practice. Owing to the evolution of international law with regard to war this traditional approach has become insufficient and must be replaced by a thorough examination of those points of law which are still related to war. Any writer who intends to make a constructive study of war must start by expounding the proposition of "war being still a living concept" in international relations and legal thought. He must then show that the laws of war have not yet been abrogated in toto either by the conditions of modern warfare or by the emergence of total war.² It stands to reason that the concept of war in positive law can be justified only in so far as it indicates the application of the laws of war and laws related to war. It follows that the concept of war *stricto sensu*, which might once have been considered irrelevant to this main issue, is now essential to it. The writer, moreover, will have to deal with the various attempts to challenge the concept of war by outlawing war itself. Such an exposition of the legal concept of war is essential to any assessment of its status in modern international law.

II

The purpose of this work is to describe the modern concept of war in general international law. It starts from the premises that *de facto* war, i. e. war in the material sense, has been accorded its own status at international law. Hence, the classical notion of *the* legal war has

¹ "Les règles du droit de la guerre ne sauraient être considérées comme des règles dérivées de principes juridiques généralement reconnus et constituant un ensemble logique. Il s'agit plutôt d'un *jus in causa positum*, d'un droit fragmentaire..." *Annuaire* 1954/I p. 556.

² The following statement which had been made with regard to the U.S.A. may fairly well be generalized: "The scale and intensity of the fighting in Korea have been such as Americans have, before 1950 associated only with full-fledged war. How such a conflict could fail to develop into World War III they only dimly understand. They had assumed that in the twentieth century, war, or at least wars involving great powers, had to be total." C.W. Tinch: *Quasi-War between Japan and the USSR 1937-1939*. World Politics 1951 p. 174.

been developed by modern international law into the broader one of *war in the material and formal senses*.

Since this work sets out to show what the law is, it deals only with the *lex lata*. Its structure, therefore, both as a whole and in detail, is determined by this aim. The writer has constantly heeded the warning that "there is always a temptation to turn to the words of great international jurists, such as Grotius and Hall and others, who wrote some time ago, when modern conditions did not prevail, though the question whether the state of civilisation which then prevailed was the same as the state of civilisation which prevails now with regard to the methods of warfare is not for me to enter into. In those days, there were declarations which one now knows, from recent examples in this century, are often omitted".³

In advancing the positive view of *war in the material and formal senses*, one should bear in mind that international law springs from custom, as it emerges from commonly accepted practice, from treaties and conventions, and from the general principles of law as recognized by civilized nations. The International Military Tribunal at Nuremberg reaffirmed that the law of war "is to be found not only in treaties but in the custom and practice of States and from the general principles of justice applied by jurists and practised by military courts". Since the present writer's purpose is to discover what the law is and not what it ought to be, he will naturally adopt the scientific method of *a posteriori* inference of law from an inquiry into State and Court practice, rather than that of *a priori* deduction from the law of what that practice should be.

The growth of a customary rule must be studied in the light of the social and political factors that gave it birth. This will be done by analysing all the major instances in contemporary history of the legal issue "War or No War".

The question "When does war exist" only assumes reality when related to the laws of war and conventions dealing with war. The writer has therefore eschewed the traditional but misleading course of seeking an answer to the question in a definition of war. No legal term is less amenable than war to systematic or symptomatic docketing. Indeed, the idea of *war in the material and formal senses* is by its nature impossible to define, for it is no more than a means of deciding which parts, if any, of the law of war and treaties are relevant to a given conflict.

Since this work is a *lex lata* inquiry, it contains no statement unsupported by jurisprudence. The writer, being neither anxious nor competent to steal the thunder of learned judges or counsel, has not attempted to ascribe their views to himself. Quotations that form part of the general argument are credited to their authors without marginal inset; this is only used to indicate views which are unusually weighty, original or idiosyncratic. Juristic doctrine is relegated to footnotes, the text being reserved for actual cases and decisions. With regard to the emergence of custom, it is often more useful to know *when* a jurist wrote an opinion than *why* he did so. Hence repeated references to such opinions are indicated by the year of their utterance.

³ Judge Goddard in *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham S.S. Co. Ltd.* (1938), England, High Court (King's Bench Division).

PART I

APOLOGY
ON WAR AS A STILL LIVING CONCEPT
IN INTERNATIONAL LAW

CHAPTER I

WAR IS BY ITS VERY NATURE A SOCIAL PHENOMENON.
ANY LEGAL APPROACH TO WAR MUST DEVELOP FROM THIS
ASSUMPTION.

SECTION 1. WAR, IN ITS ORIGIN, IS AN EXTRA-LEGAL CONCEPTION.

The question in legal theory as to whether war exists or not must necessarily pay due regard to the essential characteristics of war which are to be found in the field of sociology. War, in its origin, is an extra-legal conception. It is a fact, an event¹ that occurs and manifests itself without any legal assistance. This statement is an empirical one: It is free from any philosophical interpretation such as that of Hobbes,² who held the view that society was originally a state of *bellum omnium contra omnes*. It might be said that philosophers too, before giving a philosophical interpretation of war, are inclined to start with an examination of the material features of war. Hence Locke, before he proceeds to give a theory of the social contract, has to explain that war is synonymous with violence.³

Sociology in its broad sense implies a large number of different sciences such as theology, philosophy, economics, law or politics. For the purposes of the study at hand, it is necessary to restrict the meaning of sociology to its narrower sense, i.e., the science of sociology as a discipline of its own. It is only in this narrow field that the factual features of war can be adequately studied. Once defined, they become relevant to all the other aspects of war, no matter whether theological,

¹ Q. Wright: *A Study of War*. 1942, vol. II, pp. 685 ff.

² *Leviathan*, chap. XIII. Edited by W. van Konijnenburg, 1944.

³ *Two Treatises of Government*. Liv. II, ch. II, sec. 13 and ch. III. Cf. J. Sageret: *Philosophie de la guerre et de la paix*, 1919, p. 6.

economic or legal.⁴ It was precisely in ignoring this truism that certain writers on law failed to relate their definition of war to its content in the field of sociology. The result was that war was increasingly believed to be essentially a legal entity which was to be autonomously defined by law: Particular attention is therefore to be drawn to the fact that any legal definition of war can be nothing else but a special way of considering its sociological features for the purpose of legal administration.⁵

SECTION 2. SUMMARY OF THE FEATURES OF WAR AS ESTABLISHED IN THE DOMAIN OF SOCIOLOGY.

We are told that war is neither an art nor a science, but an act which occurs irregularly in social life.⁶ War, as social phenomenon, has been defined as an armed fight between human societies.⁷ Clausewitz, before laying down a military science of war, was eager to find out what the characteristics of war in inter-group relationships are supposed to be.⁸ He maintained that war is essentially based on a conflict of great interests which cannot be resolved otherwise than by means of the shedding of blood. War distinguishes itself from other forms of conflict which may arise between men.

To say that the groups are carrying on a conflict means that the pattern of behaviour is an instance of the type of group inter-relationship which sociologists have termed *conflict*. This pattern

⁴ "La guerre n'en demeure pas moins avec son caractère de fait accidentel, et, par conséquent, il est normal d'en traiter suivant le plan d'une technique d'accidents: causes des accidents, leurs suites, moyens de les prévenir." Sageret, 1919, p. 95.

⁵ "A state of war is regarded as an event, the origin of which is outside of international law although that law prescribes rules for its conduct differing from those prevailing in time of peace." Wright: *ibid*.

⁶ L. Delbez: *La Notion métaphysique de Guerre*. 1953, Festschrift für R. Laun, p. 625 makes the following basic statement: "La sociologie se tient sur le plan des phénomènes sensibles et n'en dégage que la causalité mécanique. Si on veut dépasser cette connaissance relative et externe de la guerre, si on veut déterminer sa nature intime et sa signification profonde, c'est à la philosophie générale, dont c'est la mission de découvrir les causes premières, qu'il faut s'adresser. La guerre fait, hélas! partie de l'ordre du monde et seule la philosophie nous offre une explication générale de l'univers, une Weltanschauung." On the relation between War and Everlasting Peace (Ewiger Frieden) cf. W. Sauer: *System des Völkerrechts*. 1952, pp. 272 ff. G.L. Dickinson: *Causes of International War*. 1920, p. 16 remarks that "early men hunted animals, but there is no evidence that they fought one another. And whereas Man may have appeared on the earth a million years ago, war, some think, does not go back more than two hundred centuries".

⁷ Cf. J. von Elbe: *The Evolution of the Concept of Just War in International Law*. AJIL 1939, pp. 665 ff. at p. 665: "Ever since history has recorded the activities of organized groups, war has been one of its principal topics. Since it appears to be a fundamental element in their life, its explanation has been sought in the basic condition of their existence."

⁸ K. von Clausewitz: *Vom Kriege*. 13. Auflage 1918; S.L. Murry: *The Reality of War. A Companion to Clausewitz*. 1914.

includes... situations in which opposing but similar entities aware of and in contact with each other are dominated by sentiment of rivalry and expectation of victory through the use of mutually recognized procedures. The pattern therefore involves a combination of separation and unity: Separation in the fact of recognition by all entities concerned of a common objective (victory) and the procedure by which it is to be obtained (armed force).

War does not, therefore, exist where the participants are so self-centered that each fails to recognize the other as a participant but treats it merely as an environmental obstacle to policy, as men treat wild animals or geographical barriers.

War is, therefore, distinguished from armed activities such as the chase among primitive peoples or colonial development among modern nations. As a conflict, war implies that attitudes and actions within each participating group are influenced by intergroup or international standards.⁹

War is a means to an end.¹⁰ The means is the contest of arms. The end, however, is the satisfaction of claims in a restored peaceful order. This point is particularly stressed by Clausewitz in the field of military science. He bases his theoretical system on the assumption that war is only the pursuance of politics by special means.¹¹ As a war grows out of political considerations, the conduct of war, in the long run, must be determined by political needs. Up to the present, the subordination of war to politics has continued to be the major principle for strategical planning.¹²

It is Communism which, in modern times, has made the pure sociological concept of war an integral part of this doctrine. The role of war in the development of Communism towards its final state, i.e., a single Communist war, is understood as the inevitable outcome of conflict between the working class and the class of capitalists. Therefore no discrimination is made, as is the case in the classical state-of-war doctrine, between war waged by States and war waged between opposed political entities within the boundaries of a single State. The Communist doctrine rightly contends that there is no difference in substance between an international war and a civil war,

⁹ Wright 1942/II p. 699. In this exhaustive treatise on war, Wright defines war in its broadest sense as "violent contact of distinct but similar entities". See C. Eagleton: *International Government*. 1948, p. 390. Cf. G. Bouthoul: *Traité de sociologie*. 1935, p. 187. E. Reves: *The Anatomy of Peace*. 1945, p. 121.

¹⁰ Cf. J.M. Spaight: *Air Power and War Rights*. 1947, p. 2.

¹¹ O. Oncken: *Die politischen Streitigkeiten im Völkerrecht*. 1936, p. 50: "Gern wählt man als Prüfstein des Politischen den Krieg: politisch sei der Streit, der geeignet sei zum Krieg zu führen."

¹² "Dass der Zweck des Krieges die Erlangung des Friedens ist, dass die Aufgabe der auswärtigen Politik in demselben Ziele mit dem Zweck des Krieges zusammenfällt,... dass der Krieg in einer den Frieden wahrscheinlich machenden Weise geführt werde." Bismarck's immediate report on December 28, 1870. *Fontes*, No. 2419.

and that as a matter of fact, the only difference between international war and civil war lies in the pattern of organization.¹³

The criteria characterizing war as a sociological concept reduce to three: (1) War is an armed conflict in progress; (2) the armed conflict must be carried on by political entities; (3) war is waged to bring forth a new stability in political order. The political result of war is expected to remain effective in the subsequent peace. Etymologically and politically, war is conceived to be the antinomy of peace.

SECTION 3. THE UNIVERSAL SIGNIFICANCE OF WAR IN RECENT RESEARCH.

In his monograph on war, Professor Wright deals in full with the question as to how far a single definition of war can possibly be found which is capable of covering all the different aspects of war. He maintains that war has objective and subjective, universal and particular aspects which may be differently stressed. One aspect emphasizes its violence, another the conflict out of which it arises, another the attitudes it engenders, and another the conditions which define and regulate it. As a consequence, Wright draws the conclusion that from each point of view war is a different thing. "While each of these aspects of war suggests an approach to its study, war must not be identified with any one of them."¹⁴

Wright denies that war can be considered as a constant factor, because it varies in character and incidence according to the different conditions. The multitude and diversity of legal definitions of war did not encourage that author to carry on his research for a single adequate definition of war in that field. A more scientific method of construing a definition would begin, not with an analysis of the literature, but with an analysis of the historical facts which are called wars. This assumption induced Wright to approach the sumtotal of wars under the following four headings: War as characterized by (1) military activities; (2) an accentuated political tension; (3) an abnormal law; (4) an intense political integration.

This analysis of the military, psychological, legal, and sociological manifestations of war suggests that all may be regarded as variables which reach a certain threshold of intensity in actual war. War may therefore be regarded from the standpoint of each belligerent as an extreme intensification of military activity, psychological tension, legal power, and social integration, an intensification which is not likely to result unless the enemy is approximately equal in material power. From the standpoint of all

¹³ Cf. B. Friedl: *Les fondements théoriques de la guerre et de la paix* en U.R.S.S. 1945, p. 123. See below pp. 68 ff.

¹⁴ Q. Wright: *A Study of War*. 2 vols. 1942, vol. II, p. 700.

belligerents war may be considered a simultaneous conflict of armed forces, popular feeling, jural dogmas, and national cultures so nearly equal as to lead to an extreme intensification of each.¹⁵

Thereupon the author compares this broad definition of war with the definition resulting from a study of the literature about war. Here, "war is a legal condition which equally permits two or more hostile groups to carry on a conflict by armed force".¹⁶

The resemblance between the two definitions leads Wright to draw the following conclusion: "War is thus at the same time an exceptional legal condition, a phenomenon of intergroup social psychology, a species of conflict and a species of violence."¹⁷ In other words, war is said to exist only where an armed conflict is carried out under the restriction that particular types of behaviour or attitudes are appropriate. To Wright, these types are essentially legal.

To say that war implies a legal condition means that law or custom recognizes that when war exists particular types of behavior or attitudes are appropriate. War does not imply a sporadic or capricious or accidental situation but a recognized condition. The thinking in any culture recognizes many different conditions, each with its appropriate behavior pattern. War implies one of many such recognized conditions characterized by the equality of the belligerents in law and their freedom to resort to violence.¹⁸

Here we think Wright's argument to be preconceived by his legal mind, for the so-called element of *recognized condition* is no more than an *admitted condition*. As Clausewitz put it in plain terms, war does not necessarily imply any recognized condition.¹⁹ The latter is only an effect of intergroup social psychology. It flows from the principle of reciprocity, which, in itself, is not legal. Here again Clausewitz offers some authority to the theory about war:

Violence arms itself with the invention of arts and science in order to contend against violence. Self-imposed restrictions, almost imperceptible and hardly worth mentioning, termed *usages of international law* accompany it without essentially impairing its power.²⁰

It would seem that, in using the terms of Wright, two things must be kept quite distinct from one another:

¹⁵ *Ibid.*, p. 698.

¹⁶ *Ibid.* vol. I, p. 8, vol. II, p. 698; cf. M.S. McDougal: *Peace and War, Factual continuum with multiple legal consequences*. AJIL 1955, pp. 63 ff at p. 64.

¹⁷ Wright 1942/II p. 700.

¹⁸ *Ibid.*, p. 698.

¹⁹ *Vom Kriege*, 1918, p. 5.

²⁰ Murry 1914, p. 80.

On the one hand, there are constituent elements of war which are derived from its inherent sociological connotation. They are: a phenomenon of intergroup social psychology; a species of conflict and a species of violence.

On the other hand, war has been submitted to certain regulations. At certain stages of human development, its general aspect became defined, its commencement and its conduct became limited to particular types of behaviour. That is, war was given over to the province of law. As a consequence, the inherent sociological connotations of war became modified for purposes of legal administration. It is only at such stages of human development that war constitutes also an exceptional legal condition.

CHAPTER II

WAR IS SURRENDERED TO THE PROVINCE OF LAW. THE INSTITUTIONALIZATION OF WAR SINCE THE GRECO-ROMAN CIVILIZATION.

SECTION 1. THE DISTINCTION BETWEEN PEOPLES WITH RESPECT TO WAR IS ONE OF THE FIRST STEPS IN THE INSTITUTIONALIZATION OF WAR.

The process may be summed up as the conversion into institution of what, to begin with, was armed robbery.¹ In the course of history, the original sociological conception of war very early became mixed up with theological, moral, and quasi-legal elements.² All civilizations came sooner or later in their evolution to a point where they could no longer conceive of war as existing without a certain jural content. We call this development the institutionalizing of war.³ One of its early marks is the habit of considering peoples and races other than one's own discriminatively with respect to war.

The "distinction between peoples with respect to war", as it has been drawn in different periods and on different occasions, has been founded on the fact that people are different as to race, language, custom, religion, etc. Such a difference has often afforded a justification for waging war. Furthermore, once such a war has

¹ Dickinson, 1920, pp. 22/23: "The armed robbery state has filled an enormous space of human history, and still continues in certain parts of the world. It hung about the skirts of the early empires in Egypt and Mesopotamia and China. It sent out, from time to time, great swarms of nomads that overwhelmed these empires and settled down on the top of them, again to be overwhelmed by large swarms. Much of such war, however large in scale, did not involve fundamental social transformation among those who carried it on. They remained mere plundering hordes. But there were peoples and conditions where there developed a distinct fighting and governing class, with a tradition and ethic all of war. The feudalism of the European Middle Ages is the best known example. But we find a similar development in Japan, and something in many ways analogous in those Homeric poems which describe war in the Mediterranean region after the break-up of the old Minoan civilisation by invasions from the north. We may call this development the institutionalising of war. And it is important to note that this institutional war preceded and was inherited by the organised states both of ancient Greece and of modern Europe."

² Cf. E. Nys: *Etudes de droit international et de droit politique*. 1901, p. 47.

³ Cf. J. Westlake: *International Law*. 2nd ed. vol. 2, 1913, p. 3; V.H. Rutgers: *La mise en harmonie du pacte de la Société des Nations avec le Pacte de Paris*. RdC 1931/IV, p. 7.

been commenced, rules for waging it, may be followed which are different from those which would be applied if the war were between peoples of the same race, language, etc.⁴

In Europe, the Greco-Roman civilisation has been of major influence in the institutionalization of war. Moreover, due regard must be paid to the influence of Christianity on the medieval conception of war.

SECTION 2. THE GRECO-ROMAN CIVILIZATION.

Though it is often asserted that the ancients lived amidst the ceaseless turmoil of war, war was far from being considered by them as their normal condition. Here and there in the ancient writings we find, no doubt, expressions relating to the necessity, the inevitability of war. But such statements do not literally represent the customary, universal practice; they are rather, on the one hand, the outcome of a desire to justify those proceedings which were impliedly recognized to be extraordinary and not representative of the usual conduct of peoples or individuals, or they are on the other hand, a philosophical generalization in reference to the manifestations of life and nature.⁵

In the system of politically and legally autonomous Greek city-states there can be discerned very early a different pattern of behaviour in the conflicts between city-states on the one hand, and those between a city-state and a barbarian political entity on the other. Ballis observes that in the intercourse between Hellenes and barbarians, the latter were regarded by the former as aliens not only in the political and legal sense, but also in the moral and religious sense. It was to a category 'beyond the pale of the law' that the non-Greeks or barbarians were relegated. Consequently the general usages concerning war were not applicable to barbarians. There was then in ancient Greece a fairly clear-cut distinction between peoples with respect to war.⁶

The strong influence of philosophical thought on individual behaviour as well as on public life is certainly one of the particular features of Greek civilization. Greek State practice with respect to war must therefore be considered in relation to the teachings of Greek philosophers.

Heraclitus designated war 'the mother of all things' in the sense of its being the fundamental principle of all change and all development. Greek philosophical thought about war, however, was largely determined by Plato (428-348 B.C.). The latter did not purport to consider war in its 'factual' reality; he regarded war as the natural state of all existence—individual against himself, man against man, family against family, village against village and country against country.

⁴ W. Ballis: *The Legal Position of War: Changes in its practice and theory from Plato to Vattel*. 1937, p. 3.

⁵ C. Phillipson: *The International Law and Custom of Ancient Greece and Rome*. 1911, vol. II, p. 167.

⁶ Ballis 1937, pp. 13/14; see reference quoted there.

War, said Plato, is not the result of a primordial condition of man, but is the by-product of civilization. It is because man follows expediency and not the good that war occurs. Accordingly, 'every city is in a natural state of war with every other, not indeed proclaimed by heralds, but perpetual'.⁷ Ballis deduces from this statement that Plato had two different notions of war, one being competition between city-states and the other an armed conflict with barbarians. He concludes that, in keeping with this distinction, Plato regarded organized hostilities between Hellenic city-states not as war but as *discord* or *disorder*. Only to conflicts between Greeks on the one hand and non-Greeks or barbarians on the other was the term *war* to be applied.

With reference to the distinction between peoples with respect to war, Plato, quite typically of the Greek mind, looked upon all non-Greeks as barbarians and natural enemies on whom perpetual war should be made in the common interest of Hellenes.⁸

In respect to war, Aristotle (384-322 B.C.) did not essentially differ from Plato. Both tended to attribute to war quasi-legal elements. Although neither the practice nor the thought of ancient Greece developed a clearly determined conception of war as a juridically defined condition, they both contributed something towards the formulation of such a notion.

The distinction with regard to war in Greek state practice became a source of concepts for the formalization of war along two lines: 1) Constitution of a *jus ad bellum*, which pays due regard to the distinction between peoples with regard to war;⁹ 2) development of a *jus in bello*, the application of which is dependent upon the *jus ad bellum*. The original philosophical thought about material war matured into a legal conception leading to the idea of *legitimate war*. As a consequence, certain defined causes were recognized as giving rise to legitimate war, that is, an armed contest authorized by the gods. In the absence of these causes, to engage in warfare was conceived to be irregular and forbidden by law and religion alike, and punishable by the gods. In the latter case both divine and positive sanctions exerted a deterrent influence.¹⁰ With regard to the *jus in bello*, "a distinction was drawn between the treatment of Hellenes and that of barbarians. The rules and principles of war were considered both in Hellas and in Rome to be applicable only to civilized sovereign States, properly organized, and enjoying a regular constitution, and not to conglomerations of individuals living together in an irregular and precarious

⁷ *Laws*. Books I, VII, VIII, XII. Edited by R.G. Bury, 1924.

⁸ Ballis 1937, p. 18.

⁹ For a study of the *jus ad bellum* in relation to the Greek organized society see S. Calogeropoulos-Stratis: *Jus Ad Bellum*. 1950, pp. 16 ff.

¹⁰ Phillipson 1911, p. 167; cf. M. Maurel: *De la déclaration de guerre*. 1907, p. 10.

association".¹¹ By and large there is a strong presumption in favour of a causal and even chronological relationship between the following stages :

1. From a purely philosophical concept, war developed towards a legal concept.
2. This legalization of war gives rise to a distinction between *jus ad bellum* and *jus in bello*.

There remains some doubt, however, as to whether the clear-cut legal conception of war can be ascribed to the Greeks in the sense which Phillipson does in the above-cited statement. Though the ancient Greeks amalgamated their philosophic conception of war with quasi-legal elements, they emphasized rather its philosophic and religious aspect than its legal basis.

The practice and thought of Rome with reference to war differed considerably from that of classical Greece in so far as its main stress reposed on a formal and legalistic regulation of war. Rome was less concerned with philosophical definitions of war than with the development of principles and rules with respect to resort to war and warfare. From the early stages of Roman civilization, efforts with regard to war were focused on the question as to how and when a war should begin. In due course the Roman practice of declaring war became inextricably interwoven with the *jus fetiale*.¹² According to this law, a complicated procedure was to be observed before Rome was entitled to go to war against political entities which were civilized states.

These fetial proceedings had above all a very strong religious character. But they possessed as well a political and judicial nature. Political, for example, when the fetials officiated as ambassadors for the purpose of setting forth their country's complaints; judicial when they gave their opinion respecting the validity or inadequacy of the alleged cause of war.¹³ The administration of the *jus fetiale* lay in the hands of the fetial college. Presiding over this body was the *magister fetialium*. Another important official was the *pater patratus*, who was the delegated spokesman of the fetials when they were sent abroad. In every case the Romans, before declaring war, despatched envoys to the foreign countries against whom they had a grievance, with a formal demand in the name of the Roman government and people to make amends for injuries which had been inflicted and to extradite the offending citizens. This demand for satisfaction, the *rerum repetitio*, was made by the *pater patratus*. He was accompanied on his mission

¹¹ Phillipson 1911, p. 167.

¹² Cf. Maurel 1907, p. 12. G. Scelle: *Quelques réflexions sur l'abolition de la compétence de guerre*. RGDIP 1954 p. 5: "Le droit fetial des Romains présente un type très net de ce Droit interne de la guerre."

¹³ Phillipson 1911, p. 181; cf. J. Kunz: *Bellum justum and bellum legale* AJIL 1951, p. 530.

by several of his associates of the fetial college.¹⁴ The elaborate fetial procedure was dispensed with under the following circumstances:

1. When the enemy was not a body of properly organized people or when the military campaign was conducted against a nation deprived of independence and freedom, on the ground that legal equality could not be obtained in the absence of the juridical personality; and in neither of these cases did the Romans admit such personality, that is, so far as the family of nations was concerned.¹⁵

2. In the event of commencing operations for self-defence when a sudden and violent attack was made by a foreign nation.

3. In the event of a civil war.

The marked trend towards a legal status of war shaped simultaneously the idea of a just war, a *justum bellum*. The Romans took scrupulous precautions to make sure that any particular war they were about to undertake was a *justum bellum*. *Justum* is here understood in the sense of the war being commenced and prosecuted in accordance with the necessary formalities required by the positive law. Sometimes this term is also employed with reference to the justifiability of the alleged grounds, which had to be investigated and pronounced upon judicially by the fetials. Further, not only was a war required to be *justum*, but also to be *pium*, that is, in accordance with the sanctions of religion and the express or implied commands of the gods.¹⁶

Cicero, the outstanding Roman commentator on the legal conception of war, gives a definition of what a people comprises with respect to war. What constitutes a people, according to Cicero, is a group joined together by an agreement covering justice and the preservation of the common good. Furthermore, he commits himself to a very precise definition of what makes a just war. War, in order to be just, must necessarily be declared. He states expressly in one passage that in default of a public declaration of war according to the fetial rites, war should be considered unjust and unpious.

In possession of a legal mind, Cicero contributed one of the most precise notions about the juridical status of war that had been worked out by any writer or jurist up to his time. Quite typical of the Greek mind the thought on war in ancient Greece was philosophical while also quite typical of the Roman mind the thought on war in Rome was legal.¹⁷

¹⁴ See for further particulars of the *jus fetiale* Ballis 1937, p. 22; Phillipson 1911/II, pp. 329 ff.

¹⁵ *Ibid.*, p. 199.

¹⁶ *Ibid.*, p. 180. The author adds: "It has sometimes been held that *justum* does not really refer to the formality of the declaration (*indictio*) but refers to the alleged cause, and that *pium*, in contradiction to *justum*, implies merely the ceremonies and formalities and that it is practically equivalent to *legitimum*. But the above considerations,... will show that such a view is fundamentally erroneous."

¹⁷ Ballis 1937, p. 31.

By and large, it can be said that the approach of the Romans to war had an opposite point of departure from that of the Greeks. Whereas the Greeks departed from a philosophical, if not quasi-sociological outlook on war, which led them to legal considerations of the problem, the Romans stressed the legal status of war, which, in turn, oriented its representative thinkers to extra-legal considerations of war. If the stress under Greek rule lay in the distinction between peoples with respect to war, it changed in the Roman civilization to a distinction of wars with respect to peoples.

SECTION 3. THE MIDDLE AGES: THE DOCTRINE OF "JUSTUM BELLUM".

Any study of medieval attitudes towards war must be approached along two distinct lines. The first was initially traced by the schoolmen, who in the early stages concerned themselves with whether it was permissible for Christians to participate in war. This trend of thought led to a new version of the doctrine of *justum bellum* which was established in conformity with the creeds of Christian theology.¹⁸ The second approach concerns the transformation of the *distinction of people with respect to war* to meet the needs of the medieval order for the differentiation of wars with respect to peoples. This results in the establishment of two different types of war, each of which was treated by law: private war and public war. The two lines of study are quite different in substance and independent of one another; they both exerted an influence on modern legal thought about war.

The doctrine of *justum bellum* as it was conceived in the Middle Ages can be traced back to the fundamental considerations of the Christian individual towards war which were treated and decided upon by theologians. In drawing a distinction between a just and an unjust war they provided a satisfactory answer for the controversies about war of the early Middle Ages. This distinction developed later on into a doctrine of the *jus gentium*. To the extent that Christianity established its reign during the Roman Empire the practical question arose whether the military profession and participation in wars were compatible with the Christian religion. It was at this stage an urgent question for the individual conscience.

The doctrine of Christ was in its essence pacifist. To be sure, the Gospel did not condemn war outright, but Christian teaching was implicitly against the use of force, and during the first few centuries of Christianity, war found harsh adversaries amongst the Christian fathers. Some of them held the view that not only was the faithful forbidden to use force in self-defence, but he could not even invoke the most legitimate justification, i. e., the law of the State. Clement of Alexandria, Tertullian, Origen, Lactantius and others denounced any recourse to

¹⁸ Cf. Elbe AJIL 1939, p. 667: "It remained to Christianity to give material content to the formal concept of *justum bellum* of the Romans."

arms as unjust. For them peace was of God, war of the devil.¹⁹ Origen makes the peaceful character of his religion explicit in the following words: We bear arms against no nation and we do not teach the pursuit of war, for we are the children of peace through Jesus Christ. Here and in the writings of the other Christian teachers of that era war is evidently envisaged in its purely sociological content.

In fact, it would not be possible to find in any ecclesiastic before the age of Constantine a single word in favour of a passage clearly authorizing the faithful to engage in war.²⁰ The coming of Constantine and the consequent radical change in the relationship between Church and State obliged the Church to work out an official attitude towards the problem of war. This was the more pressing since the deadly threat of the Germanic tribes menaced the Empire on its frontiers. The Edict of Constantine in favour of Christianity dates from A.D. 313. Already in the following year an anathema was pronounced upon those quitting the colours for religious reasons. Hitherto the Christian had been taught to regard war as an evil thing. After the Council of Nicæa in 325, however, the Christian soldier was expected to shed blood if the Emperor sent him to war. St. Athanasius held that in a just war it was permissible and even glorious to kill one's adversary.²¹

The doctrine of the just war of St. Augustine (354-430) is to be considered in the light of the political background of his time. This doctrine was intended to be on the one hand an apologetic theology and on the other a weapon against non-Christians and philosophers, who were blaming on Christianity the weakening and collapse of the Roman Empire. The distinction between just and unjust war, which is fundamental to St. Augustine's doctrine, introduced the idea of the legitimacy of war.²² Naturally this new aspect of war became of interest to the legal mind. The forerunners and founders of international law inclined to start out from the idea that war, by its very nature, is a juridical entity. The maxim of *legitimacy of war* was said to be inherent in it. This premise, which we think to be wrong, gives rise to controversies even among contemporary writers on international law.

The doctrine of the just war, as it left St. Augustine, was not intended to give an exhaustive definition of war. Nor did it pretend to lay down principles for the law of nations. Being primarily a theological conception, it aimed at:

1. meeting the needs of the Church in its relation with the Civil power;

¹⁹ Cf. E. Nys: *Les origines du droit international*. 1894, pp. 44 ff.; Calogeropoulos 1950, pp. 25 ff.

²⁰ Ballis 1937, p. 42; see also A. Vanderpol: *La doctrine scolastique du droit de guerre*. 1919, pp. 171 ff.

²¹ Nys 1894, p. 45; see also M. Bourquin: *Grotius est-il le père du droit des gens ?* 1948, p. 90.

²² This distinction does not seem to have been evolved by any Christian writer during the first three centuries. See Vanderpol 1919, p. 193; cf. Delbez 1953, p. 626.

2. providing the working priest with guidance to meet the event of his being called upon to define the Christian's attitude towards a given war;²³

3. combatting the Manachæan doctrine which found the origin of evil in a principle independent of God and man, a doctrine at which St. Augustine struck with particular violence wherever it touched the right to wage war; and

4. meeting an urgent political need felt by the Roman Empire of that time, namely defence against the barbarian invasion.

It is not that the great thinker fails to acknowledge and deplore the frightful calamities of war and to preach moderation in battles, but the practical mind is too strong for his sentiment and he admits that recourse to arms can conceivably be just.²⁴

In discussing the just war, St. Augustine aims at an analysis not of war as such but of the attitude of 'Christian law' towards war. The law of the Bible has little in common with the rulings of positive law. It is in the light of this fact that his answer to the tribune Flavius Marcellin must be understood. Flavius asked if it were no longer permissible, according to the Christian doctrine, to initiate reprisals against the invading barbarians. "If the teaching of the Gospel", answered St. Augustine, "had condemned absolutely all sorts of wars, St. John the Baptist would have needed to give no other advice to the soldiers who consulted him on what it was necessary to do to secure salvation, than to bid them to renounce their profession. However, he did say: Do violence to no man, defraud none and be content with your pay. As soon therefore as he asks them to be content with their pay it becomes clear that he did not forbid them to carry arms."²⁵

The evolution of the just war doctrine from St. Augustine through Isedor Seville (570-636) to the point where it was remoulded by St. Thomas Aquinas (1225-1274) signalized the transition from its apologetic and theological grounds towards a juristic field of application. In so far as the idea of the just war was identified with an aspect of natural law, it had become sanctified by law and even became a positive concept in the *Decretum Gratiani* (1150).²⁶ *Causa XXIII, questio II, can. I*, describes that war as just which is waged "in order to restore stolen property or to repel enemies".²⁷

Aquinas studied the problem in greater detail. He stipulates three conditions before a war may be called just: (1) The declaration of war

²³ H. Wehberg: *L'interdiction du recours à la force*. RdC 1951/I, p. 13: "Il faut se souvenir que les Scolastiques ont parlé, non en juristes, mais en théologiens. Ils ont conçu leur tâche comme celle d'un confesseur qui s'adresse à la conscience de chaque prince." To the same effect C. Schmitt: *Nomos der Erde im Völkerrecht des Jus Publicum Europaeum*. 1950, pp. 74 ff.

²⁴ Nys 1894, p. 45.

²⁵ Butler-Maccoby: *The Development of International Law*. 1928, p. 109.

²⁶ Vanderpol 1919, p. 297.

²⁷ H. Wehberg: *The Outlawry of War*. 1931, p. 2; Butler-Maccoby 1928, p. 109.

must be made by the legitimate authority; (2) there must be a *justa causa*, which in his opinion is to be found only in the fact "that those against whom war is being waged deserve this on account of some fault". (3) The just intention of the belligerent "to do the good and avoid the evil" should not be absent (*intentio bellantium recta*). In laying down these criteria Aquinas was taking a far more practical line than many of the later canonists.²⁸

Besides this juridic concept of the just war, it is not surprising that Aquinas should have devoted so little time to an inquiry of legal rules dependent upon this concept. His treatment of the legitimacy of the use of ambush, however, reads like a legal definition for the application of a rule of war.²⁹ This definition implies the idea that it is possible to consider differently the conduct of war. The concept of the 'just war' does not modify the notion of war as such. All it does is determine the conduct of war of that party which has legitimately resorted to war.

It is of interest to notice to what extent the theoretical approach changes when the idea of the just war passes from the hands of the theologians to those of the lawyers.³⁰ Johannis de Lignano (ca. 1310-1383), professor of civil and canon law at Bologna, reinterpreted the doctrine of the just war in evolving his theory of spiritual as opposed to material war. The former could be either a celestial or a human spiritual war; the latter is either a universal or a particular material war. The author defined war as "a contention arising by reason of something discordant offered to human desire; tending to exclude the discordancy".³¹ It appears that Lignano regarded war in itself as an extra-legal concept.

The doctrine of the just war was evolved in its scholastic form by two Spaniards, in particular the Dominican Franciscus de Vittoria (1480-1546) and the Jesuit Franciscus Suarez (1548-1617).³² The latter was compelled, before examining the question as to whether war is evil in itself, to reexamine the content of the word war. Unlike Lignano,

²⁸ The Decretum Gratiani contains no explicit definition of war. However, some explanations about the war are given in some of the canons of Causa XXIII such as:

"Les guerres matérielles sont la figure des guerres spirituelles." Questio I, can. I, see Vanderpol, op. cit. p. 292.

"Car on ne cherche pas la paix pour préparer la guerre, mais on fait la guerre pour obtenir la paix." Questio I, can. III, see Vanderpol 1919, p. 295.

²⁹ Secunda Secundae, Questio XI, art. III: "Mais en opposition est ce que dit Augustin: Quand on entreprend une guerre juste, peu importe au point de vue de la justice que l'on combatte ouvertement ou avec embûches; et il le prouve par le témoignage du Seigneur lui-même, puisqu'il a donné à Josué l'ordre de tendre une embuscade aux habitants de la ville de Haï."

³⁰ Bourquin, 1948, p. 81: "Les internationalistes du moyen âge n'étaient généralement pas des juristes — c'étaient surtout des moralistes et des théologiens. Les formules juridiques n'avaient donc à leurs yeux qu'une valeur accessoire; aussi ont-ils simplement emprunté les leurs à l'antiquité."

³¹ *De Bello, De Represalis et De Duello*. Carnegie Endowment, 1917, p. 216. Cf. Wehberg RdC 1951/I, pp. 21/23.

³² Cf. Nys 1894, pp. 95 ff.

he does not proceed by giving a self-contained definition of war but rather by classifying the different forms of conflict from a legal viewpoint.³³

In summarizing medieval notions of war, it seems reasonable to say that the great thinkers of the period had little interest in the notion of war as such. The study of the 'law of war' in the Middle Ages originated from the religious and moral problems which were posed by the very essence of the Gospel. The solution was found in the doctrine of the just war. By the end of the Middle Ages some general agreement about this doctrine had been reached in three directions at least;

The authority of an independent prince was almost universally held indispensable before armed operation could be rightly undertaken, although a minor authority might undertake defence against direct aggression. A just cause was held to postulate a preceding refusal or redress of injuries done, and a just aim or intention in a declarant of war could be thought of as including the attainment of a speedy peace on terms which redressed the injustice and made provision for such matters as the cost of armed proceedings.³⁴

The outcome of theological reflection upon war imperceptibly emerged via natural law into the positive law of the period.³⁵ The distinction between peoples with respect to war achieved practical application largely in the crusades against Turks and other infidels.

SECTION 4. THE DISTINCTION BETWEEN PRIVATE AND PUBLIC WAR.

The phenomenon of the so-called "distinction of peoples with respect to war" became in the legal field a "distinction of wars with regard to people". The outcome of this evolution in the Middle Ages was a differentiation of wars into private and public wars which took into account the peculiar structure of the feudal system. In the early stages of the Middle Ages warfare between vassals of the same or different feudal kingdoms had existed. This warfare which was known as 'private war' had been authoritatively regulated by the German Empire and by France.

³³ Suarez declared: "Une lutte extérieure, qui trouble la paix au dehors est appelée guerre, quand elle a lieu entre un prince et son Etat ou entre les citoyens et l'Etat, rixe ou duel, quand elle a lieu entre particuliers"; see Vanderpol 1919, p. 362. Suarez admitted that what differentiates these various conflicts is their object rather than the form they assume.

³⁴ Butler-Maccoby 1928, p. 109.

³⁵ "Saint Thomas et ses successeurs s'adressaient à la conscience de l'individu. Leur doctrine devait être considérée du point de vue de la théologie et non de celui de la science du droit. ... Les Thomistes ... ne fondaient pas leurs théories sur le droit des gens en particulier, mais simplement sur un droit de nature indéterminée, même lorsque celui-ci rentrait purement dans le domaine privé du prince". Wehberg RdC 1951/I, p. 14.

By solemn agreements, and by acts of an almost constitutional character, war between vassals was recognized; and some went so far as to include a war between vassals and their sovereign. Magna Carta permitted in cases of royal delinquency 25 baronial 'observers' to proceed to arms against the King. The Aragonese Privilege of Union made a similar provision in Aragon, while in Castile public recognition was given to the right of the nobles to withdraw their allegiance by a *diffidatio*.³⁶

Thus, private war was defined as an armed contest between the private and public war. The question of what constitutes a public war — remarks Ballis —³⁷ is inextricably blended with the problems of sovereignty. The proper authority who may declare war is a most essential factor in the ascertainment of a public war. It was not until the passing of feudalism, and in the emergence of the patrimonial State, that the question of what made up a public war became settled.³⁸ Nys presents us with interesting comparisons between the rules of private war — glorified duel — and the rules for public war.³⁹

It can be seen that the concept of 'solemn public war' of the Middle Ages furnished the constituent elements for the legal form of the state-of-war doctrine which was to determine the concept of war since the 17th century. Whereas the latter got closely tied up with the modern notion of State, the solemn public war of the Middle Ages must be considered in the light of the particular meaning of a *Respublica*.

The question of what constitutes public war is one which is closely related to the whole gamut of theological, legal and political problems that characterized the Middle Ages. And it is especially interwoven with the question of sovereignty, its conception, birth and maturation.⁴⁰

Private warfare had been weakening both the power of the Empire and the moral sovereign over all Christendom. The latter promoted the lessening of private wars by the enactments of 'Truce and Peace of God'.⁴¹ But only towards the end of the Middle Ages did energetic efforts succeed in suppressing private wars. France took steps in prohibiting private warfare by the end of the 14th century, whereas only one century later the German Empire succeeded in outlawing private wars in the 'Ewigen Landfrieden' of 1495. As a consequence, the conduct of hostilities between non-sovereign regents was, from the legal

³⁶ Butler-Maccoby 1928, p. 4; see also Ballis 1937, pp. 32 ff. Clyde Eagleton: *The Attempt to Define War*. 1933, p. 281.

³⁷ *Op. cit.* pp. 32/33.

³⁸ G. Kappus: *Der völkerrechtliche Kriegsbegriff in seiner Abgrenzung gegenüber den militärischen Repressalien*. 1936, p. 8, observes, that Grotius meant expressly to include the *bellum privatum* in his definition of war; cf. *De Jure Belli ac Pacis*, I. 1, cap. 1, par. 1.

³⁹ *Le droit international*. 1912, vol. III, pp. 98 ff.

⁴⁰ Ballis 1937, p. 33.

⁴¹ *Ibid.*, p. 37.

viewpoint, no longer a species of war but a rebellious contest.⁴² The definition of Gentili, stating that war is 'a just and public contest of arms'⁴³ is explained by the author in appropriate terms; and shows clearly this evolution. The author gives the following explanations: "In fact, war is nothing if not a contest, and it is a contest of arms because to wage war in one's mind and not with arms is surely cowardice and not war. ...Furthermore, the strife must be public, for war is not a broil, a fight, the hostility of individuals. And the arms on both sides should be public, for bellum, war, derives its name from the fact that there is a contest for victory between two equal parties, and for that reason it was at first called duellum, a contest of two. Therefore that definition which appeared after ours, 'war is armed force against a foreign prince or people' is shown to be incorrect by the fact that it applies the term 'war' also to the violence of private individuals and of brigands."⁴⁴

The outcome during the Middle Ages of the legal distinction between public and private wars was due to the fact that war *per se* has only a sociological meaning. It is under this assumption that war is susceptible of being taken into consideration under different aspects in the realm of law.⁴⁵

SECTION 5. TOWARDS THE DOCTRINE THAT WAR IS A STATUS.

With the doctrine of the just war Christian intelligence had established the possibility of participation in war without a breach of the moral code enjoined by Christ. After making it clear that in certain cases an actually offensive war might be justifiable, the doctors of the Church had devoted attention above all to considerations of the criteria of a just war. However, the generality of the moral conceptions contained in this doctrine is questioned from the 15th century onwards. The tendency now is towards a juridical formalization of the concept. The criterion of the *justa causa* in the doctrine of the just war becomes gradually identified with the problem of the *justus hostis*.

The pronouncement had already been made by Pedro Ayala (1332-1407), Spanish statesman and historian, that only military engagements between sovereign princes could be regarded as war in accordance with the *jus gentium*. Other military actions could be regarded only as in the nature of sanctions or of campaigns conducted to suppress disturbances due to pirates, rebels or brigands.

⁴² H. Wehberg: *Krieg und Eroberung im Wandel des Völkerrechts*. 1953, p. 23 observes that the great condottieri Wallenstein and the Duke Bernhard von Weimar knew well enough, that they had no authority, as subordinates of the Emperor and so without Reichsstandschaft, to wage war of their own initiative. If they nevertheless did initiate war they risked being regarded as rebels and sentenced accordingly.

⁴³ *De Jure Belli Libri Tres*. Liv. I, chap. II; Carnegie Endowment 1933.

⁴⁴ *Ibid.*

⁴⁵ Cf. Dickinson 1920, pp. 25 ff.

Now rebels ought not to be classed as enemies, the two being quite distinct, and so it is more correct to term the armed contention with the rebel subjects execution of legal process, or prosecution, and not war. There is, therefore, no need of the authority of the prince; the authority of a local magistrate will suffice.⁴⁶

According to Ayala there is only one precise legal criterion for war. War should only be considered as a military operation conducted by two hostile sovereign princes, that is to say conducted against a *justus hostis*. Such a war is then a *bellum utriusque justum*. The period of transition from the medieval doctrine of just war through a formalization of that theory until its reshaping at the hands of Grotius can be summarized under the following headings:

(1) The existence of war is conditioned on an initiator having *summa potestas*.

(2) The *justa causa*, formerly closely bound up with the concept of justice conformable to Christian morality is more and more subordinated to the sole judgment of the sovereign.

(3) The former alternative between just and unjust war is transformed into a new alternative between war and no war at all.

(4) The competence of the Pope in having the last word for the legal qualification of armed conflicts no longer had any relevance. The question of deciding whether at a given moment war is being carried on or not is to be settled exclusively by the temporal sovereign.

(5) The idea of the just war is formalized into that of the just enemy.

A further trend which marks clearly the transition from the medieval conception of war to that of modern nationalism is exposed by Schmidt.⁴⁷ He emphasizes the implication of this development which is the human and legal impossibility of classifying a belligerent as the initiator of a just or unjust war.

To the extent that the problem of the just war became a question of the just enemy it manifested more clearly two distinct aspects, namely the *jus ad bellum* and the *jus in bello*. The influence of this juridico-political tendency towards formalization of the *jus ad bellum* is already reflected in the jurisdiction of some of the courts of that time. In 1480 the English Court rendered the following dictum: "If our Lord, the

⁴⁶ P. Ayala: *De Jure et Officiis Bellicis et Disciplina Militari Libri III*. Liv. 1, chap. II; translated by Bate in 'Carnegie Institution of Washington' 1917, p. 11. The author adds in paragraph 15: "For the same reason, the laws of war and of captivity and of postliminy, which apply to enemies, do not apply to rebels, any more than they apply to pirates and robbers — these not being included in the term 'enemy'. Our meaning is that these persons themselves can not proceed under the laws of war." Cf. Wehberg RdC 1951/1, p. 23.

⁴⁷ C. Schmidt: *Der Nomos der Erde*. 1950, pp. 124 ff.

King, would not assent to it, it would not be called a war, but if there were no hostilities in fact but the peace is broken between the King of Denmark and our Lord the King, there is war.”⁴⁸

With the publication of ‘Six livres de la République’ in 1576 Jean Bodin gave new impetus to the process of formalizing the doctrine of just war. Henceforth war was to be regarded as the *ultima ratio regum*.⁴⁹ As a result, attention was shifted from the legality of initiating a war towards a legitimate conduct of war. Needless to say, the elaboration of a *jus in bello* was intended to govern only the military operations between *justi hostes*, namely between sovereign princes who alone possessed the *jus belli ac pacis*.

SECTION 6. GROTIUS, THE FOUNDER OF THE “STATE OF WAR” DOCTRINE.

The process of formalization of the *jus ad bellum* as understood by Ayala reached its logical outcome in the practice of States in the course of the 16th century. The sovereign princes assumed increasingly discretionary powers to commence war which they regarded as the best means of guaranteeing their legitimate rights. War had become one of the devices consecrated by use for settling disputes between sovereigns. It should be pointed out, that the right of neutrality as a part of the *jus gentium* had not been thought of. However, with the passing of the Middle Ages the practice of neutrality was made a little more possible.

States recognized a condition of abstention from hostilities, whether these were deemed justly or unjustly undertaken, as a possible position for other states to adopt in such cases as were covered by the signature of an *abstinentia guerrarum* on their part with other contractants. Such contracts as the treaty of 1463 between Scotland and Denmark may be cited as containing instances of the *abstinentia guerrarum*.⁵⁰

Difficulties from the juridical point of view, however, began to arise from the common practice that the sovereign could initiate and pursue war without necessarily engaging continuously in military operation. Cicero’s classical definition *bellum certationem per vim*, that is, the settling of differences by way of force, no longer covered the practice of States. Legal recognition of this consideration of wars is given by Grotius, who rejects the classical definition of Cicero in favour of that declaring war to be *non actio, sed status eo nomine indicatur*. War thus becomes from the legal point of view the condition in which sovereigns place themselves when seeking to settle their differences by force.

The description of war as a condition implies that in the legal field war should be regarded independently from its ordinary meaning. In

⁴⁸ A. McNair: *Legal Effects on War*. 1944, 2nd ed., p. 2.

⁴⁹ Wehberg 1953, p. 22.

⁵⁰ Butler-Maccoby 1928, p. 231.

maintaining that war is a *status*, Grotius had no intention whatever of denying the fact that war, from the sociological point of view, is characterized by a conflict of arms. Grotius' concept is intended to cater to the anomalous situation of a sovereign who finds himself in a position where the usual relationship of peace has broken down without their necessarily being any military operation in progress. The Thirty Years War had known long periods where actual fighting did not occur at all. This practice which custom had evolved achieved recognition through the doctrine of Grotius. The latter would be, from the sociological point of view, little better than a paradox had not common usage already established a distinction between a state of war and a campaign of war.

In describing war as a *status* Grotius gives it a legal definition quite independent of its sociological characteristics. In spite of its abstraction prone to ambiguity, Grotius' conception of war was accepted by his time and became the leading conception for the following centuries. This is due to the great impression which his work *de jure belli ac pacis libri tres*⁵¹ produces on the framers of international relations. Unlike Victoria, Ayala, Suarez and Gentili, Grotius wrote a complete statement of what he thought the existing law was. The greatness of his work — remarks Ballis — does not lie in its originality but in its thorough compilation of what had already been written on the subject of international law.⁵² However, the success of his work is due, there is little doubt, to the particular sociological circumstances of his time. International anarchy had been prevailing for nearly two centuries. In a sense, the Thirty Years War was nothing else but a conflict of interests as to how an international legal order was to be established. At any rate the stress was laid on the idea of reestablishing an international order. This general political trend created the need for an appropriate 'code' of international law. It is with regard to these circumstances that the work of Grotius provided by its 'realism' a satisfying answer to the needs of his time.⁵³

Nearly all Grotius' successors like Zouche, Pufendorf, Bynkershoek, Wolff, Vattel and the majority of publicists of international law up to the first World War support Grotius in his definition of war as a *status*. In his remarkable treatise Vattel adopts what is virtually Grotius' formula when he defines war as a state in which a sovereign pursues his rightful ends by means of force.⁵⁴ His objective was less to propose rules to

⁵¹ Bourquin 1948, p. 94: "Le *De Jure Belli ac Pacis* est une œuvre de transition, où le passé et l'avenir rivalisent d'influence. On nous le présente le plus souvent comme ouvrant un nouveau chapitre de l'histoire du droit. Et c'est exact. Mais on pourrait, tout aussi exactement, voir en lui la fin du chapitre précédent; la dernière ou l'une des dernières manifestations de ce qui avait été pendant des siècles la conception de la vie internationale."

⁵² *Op. cit.*, p. 109.

⁵³ Cf. BYB 1920/21, p. 117.

⁵⁴ E. de Vattel: *Le droit des gens*. Liv. III, chap. I, par. 3: "cet état dans lequel on poursuit son droit par force."

regulate recourse to war than to moderate a right regrettable in itself but all too often necessary. To this end he invoked the principles of justice, equity and humanity without ever thinking in terms of an attack on the classical conception of war as it was formulated by Grotius. However, Vattel admits that the term war is often applied to the act itself or the manner of prosecuting one's right by force, but is better understood in the sense stated by him.

It is to be noted that while Grotius and his successors admit that a State can be at war without necessarily engaging in warlike operations, they stop short of the conclusion *e contrario*, which would make it possible for a State to wage war without being for that reason in a state of war. Vain attempts to evade the argument *e contrario* rendered abortive many of the controversies and theorizing on the impact of the legal definition of war as defined by Grotius. Nevertheless the soundness of the argument *e contrario* was too strong for the jurists in their attempts to ignore it. As we have seen, the history of recent centuries is rich in precedents demonstrating that many a war has been fought without creating a state of war.

Many are the difficulties in the way of a legal recognition of this conclusion *e contrario*. They stem above all from the fact that there are vested interests in maintaining the 'one way' interpretation of war as a status. We shall not discuss the many considerations of a political nature, which might determine a State to wage *de facto* war while being interested in evading the many implications, material and immaterial, legal and political, of an official declaration of war. In doctrine and State practice the definition of war as a state, — the so-called *state of war* doctrine — developed into a kind of *credo* of international law. According to this *credo* war was on the one hand said to be legally definable by one all-embracing definition. On the other hand, any good definition of war had to bring out the fact that war is a state or condition of affairs, not a mere series of acts of force. It was only to war as a state of affairs, that international law attached far-reaching consequences. By reason of those consequences it was proclaimed to be necessary, as a matter of practice rather than of speculation, to define the state of affairs giving rise to them.⁵⁵

The rigidity of the state-of-war doctrine induced States to disguise their operations of war in certain cases by terms like intervention, armed reprisal, blockade, expedition, etc. It is not until the 19th century that controversies were opened on the soundness of the state-of-war conception. While in diplomatic correspondence a distinction had very early become apparent in the use of the two formulations *to be in a state of war* and *to be at war* (or to wage war), the science of international law had to wait for appropriate guidance from the political realm before it could consider this distinction. The problem at stake became evident above all in connection with (1) the delimitation of the

⁵⁵ See McNair: *The Legal Meaning of War*. Grotius Transactions 1926, p. 33.

state of war and 'state of reprisals', (2) the impact of *de facto* war on the decisions of courts, and (3) the position of civil wars in international law.⁵⁶

SECTION 7. CONCLUSION.

Any exhaustive investigation in legal history about war will show that the doctrinal belief since Grotius in *the* one and exclusive legal concept of war is not founded in history. From the very beginning of the institutionalizing of war in legal terms, it was obvious that war was differently conceived since its legal consequences were made dependent upon the modality of political relationship, which previously determined the commerce between the parties in dispute. This is to say that the social distinction which was early made between peoples with regard to war went hand in hand with a legal distinction between wars with regard to peoples. In consequence the conclusion can readily be drawn that the original concept of war in the province of the *jus gentium* was not an absolute but a relative one which admitted of alternative legal considerations.

This alternative legal consideration of war can be retraced in the development of the *jus in bello* and the *jus ad bellum*. Each of these legal orders was provided with different rules according to whether or not war was waged *inter pares*. In the Middle Ages an analogy to that distinction was drawn in that wars between faithfuls were set on a different footing from wars against the infidels.

Moreover, the difference between private war and public war in the Middle Ages which was recognized in the province of law is another persuasive instance to the effect that in legal theory the concept of war is by no means bound to a single consideration.

The rigidity of Grotius' state-of-war doctrine, which determined State practice for more than two centuries, gave rise to the general conviction that *a priori* war can be considered in the province of law only by one exclusive definition. This legal fiction, however, could be maintained only as long as the 'logic of facts for legal needs' failed to be stronger than political arbitrariness.

⁵⁶ See below, pp. 226 ff.

CHAPTER III

THE CONCEPT OF WAR IN THE MATERIAL AND FORMAL SENSES. ITS POLITICAL, LEGAL AND DOCTRINAL BACKGROUND.

SECTION 1. THE DEVELOPMENT OF PARLIAMENTARIANISM AND ITS INFLUENCE UPON THE MODALITY OF WAGING WAR.

The partition of State power among the legislative, the executive and the administrative branch of government became one of the political characteristics of the 19th century. This served to do away with the centralization of the war-making power in the majority of the European States. As long as the system of absolute monarchy had prevailed within the community of European States, all power of waging war became the sole prerogative of the sovereign. The dictum of Louis XIV: "L'Etat c'est moi" could fairly well be paraphrased by "la guerre c'est moi". Yet once this power had been divided between the executive and the legislative bodies, the consent of the latter became imperative for a declaration of war.

This state of affairs had to give rise to two contradictions. On the one hand it occurred that the executive intended to wage war but was not or would not be accorded parliamentary consent. If the executive still engaged in military activities it was obliged to deny the character of war for the ensuing contest of arms.¹ This was generally made by calling such military measures expedition, occupation, intervention, police action, peaceful blockade or quite simply enforcement action.

Another dilemma with regard to war was felt in municipal court practice. The latter was supposed to find guidance in their consti-

¹ As an instance, the observations may be referred to which J.E. Howard made with regard to France: "War is declared by the President of the Republic; but the Constitution requires that war shall not be declared without the previous consent of the two Chambers (Law of July 16th, 1875, Art. 9). It has been seen that this constitutional limitation on the power of the executive applies only to formal declarations of war and only to certain categories of war. France has been formally at war only twice during the history of the Third Republic, from 1914 to 1918 and again in 1939, and the weakness of the constitutional limitation is shown by the fact that a large number of other military campaigns have been undertaken since 1875 without any declaration of war and consequently without the formal approval of Parliament." *Parliament and Foreign Policy in France*. 1948, p. 130. Howard quotes as the more important of these campaigns: Tunis 1881; Tonkin 1883-1884; Madagascar 1883-1886; Siam 1893; Morocco 1911-1914; Soviet Russia 1918-1920; Syria 1925; Morocco 1925.

tutional law concerning war. On the other hand it was generally agreed that the constitutional rules with regard to war were related to the classical notion of war a state; hence the state-of-war doctrine had become part of the law of the land. In Anglo-Saxon countries the legalistic structure of this concept gave rise to the notion of *war in the legal sense*. This meant a war which had been opened in conformity with the constitution. It was made a rule that courts in these countries were bound to apply a special procedure for their determination whether war existed at any given occasion.² The question as to whether or not war, in its legal sense, existed, was and still is to be determined only by the political power of the government and of this the courts have to take juridical knowledge.³ That is, the competence of deciding questions concerning the existence of war belong to the political power and not to the juridical power. This fact did not fail to obscure the meaning of war in international law. State and court practice as well as legal doctrine increasingly resorted to sophistry when it was obliged to take account of *de facto* war but at the same time purported to avoid its necessary legal consequences.⁴

SECTION 2. ATTEMPTS IN LEGAL THEORY TO RECONCILE THE RIGIDITY OF THE STATE-OF-WAR DOCTRINE WITH STATE PRACTICE.

The rigidity of the classical notion of war as a status left no room for the distinction between material war and formal war. Controversies in legal science hinged exclusively upon *one* all-round and exhaustive definition of war which had to take account of the premise that war was 'one and indivisible'. Hautefeuille specified the maxim of the 'indivisibility of war and peace' by the statement that a State could never be simultaneously at war and at peace with another State.⁵

Yet internationalists gradually moved towards a more general definition of war which no longer excluded *civil war* and war in which

² Cf. W.J. Ronan: *English and American Courts and the Definition of War*. AJIL 1937, pp. 642, 656.

³ Cf. *Sutton V. Tiller*, 98 Am Dec 471, 472 (1869). Maurel 1907, pp. 203/4 rightly declared: "La collaboration des deux pouvoirs sera effective dans les véritables guerres, mais les gouvernements, de nos jours, prennent souvent l'initiative des hostilités, sans vouloir engager la guerre proprement dite; par exemple, sous forme de représailles violentes, de blocus pacifiques, d'expéditions, même d'occupations du territoire étranger.

⁴ T. Baty: *Abuse of Terms 'Recognition': 'War'*. AJIL 1936, pp. 377 ff. remarks in this respect: "It is a sophistry to which human nature commonly resorts, when one wants to perform an act and at the same time to avoid its necessary consequences, to give it a fresh name. Thus, if people wish to live in concubinage and yet to be received in decent society, they call it 'companionate marriage', and if statesmen wish to rule and to exploit a country without conferring on its inhabitants the grand privileges of citizenship, they call the annexation 'protection'". (p. 377.)

⁵ Cf. Grob 1949, p. 195.

one of the belligerents was lacking the quality of a State.⁶ Here and with regard to non-declared war between States the first signs emerged of a distinction between material and formal war. They consisted of the synonymous use of the terms 'state of war' and 'war in the legal sense' on the one hand and the attempt to oppose them to such terms as 'acts of war', *de facto* war, or war in the material sense. This however, did not mean that the traditional faith in an exhaustive definition of war was abandoned. Should war be defined by its objective or subjective criteria? New doctrinal approaches to this question were conducted along the following lines:

(1) Modification of the state-of-war doctrine. The basic criterion remains the State which is regarded as inseparable from the notion of war. The maxim of "war one and indivisible" is equally maintained. The concession to State practice resides in the statement that it is desirable to apply certain laws of war in armed conflicts which are fought out by political entities other than States.

(2) The 'realistic' approach which tries to establish a fundamental distinction between large-scale wars and small-scale wars.⁷

(3) The dual approach in favour of either the subjective theory of war or the objective one.

(4) The elaboration of the concept of war as defined by international law.

(5) The opposition between the Continental concept of war and the Anglo-Saxon concept of war which is said to be characterized by the difference in the respective meanings of 'enemy'.

(6) The distinction between *de facto* war and *de jure* war.

It is in the last four above-mentioned categories that one finds the basis of the legal conception of war in the material and formal senses. The elaboration and formulation of that conception must essentially be attributed to the legal work of Professor Guggenheim.

⁶ See, for instance, H. Taylor: *A Treatise on International Public Law*. 1901, pp. 449 ff. That author looks for a definition of war in its broader sense which might be "the condition accompanying an armed contest between belligerent communities neither of which recognizes *de facto* any political superior". That definition is intended to exclude private hostilities and to include civil war.

⁷ This approach is mainly concerned with the application of the laws of war. While localized wars, i.e., small-scale wars are said to retain their genuine character of war and can therefore be submitted to the rules of war, large-scale wars are declared to be beyond the scope of any legal control. Cf. G. Schwarzenberger: *The Rule of Law and the Disintegration of the International Society*. AJIL 1939, p. 69; H.A. Smith: *The Crisis in the Law of Nations*. 1947, p. 57, and *The Law and Custom of the Sea*. 1948, p. 70, where that author declared with regard to the two World Wars: "If the law in such circumstances largely broke down, it was because the assumptions upon which it rested were no longer true." See also R. Stödter: *Die Rechtslage Deutschlands*. 1948, p. 114 and below, pp. 123 ff.

Paragraph 1. The subjective and objective theories of war.

The 'logistic' definition of war as a status signified in its strict sense that there can be no war unless there is an intention to make war. No authoritative statement, however, was made which determined the character of any such intention. Does the existence of a state of war depend upon the declared intention of one of the contending parties or can acts of armed force be self-expressive to that effect?

The protagonists of the subjective theory hold that so long as neither the aggressor nor the attacked party declare to be at war with each other, their mutual resort to armed force can not constitute a state of war.⁸ The *animus belligerendi* of a State is made the essential criterion which alone can create a state of war. This theory had been made the predominant legal doctrine in the course of the 19th century. For the purposes of State practice it made plausible a demarcation between war and reprisals.⁹ After World War I the subjective doctrine of war, in spite of a strong opposition by the smaller States, was finally accepted by the practice of the League of Nations and laid down in a number of its documents.¹⁰

The protagonists of the objective doctrine of war hold with De Boeck and Despagnet that acts speak louder than words and that the will to wage war can never be absent when a nation tries to effect its designs against a recognized State by open force or invasion. The essence of war is seen by the 'objectivists' in the employment of force which is declared to be self-explanatory of the existence of war.¹¹

⁸ For a compilation of authors of the subjective theory cf. H. Hilleke: *Der Kriegsbegriff und seine Stellung in der Weltordnung*. 1932, pp. 3/10 who enumerates 77 definitions of war; G. Kappus: *Der völkerrechtliche Kriegsbegriff in seiner Abgrenzung gegenüber den militärischen Repressalien*. 1936, p. 58, n. 32; F. Grob: *Seventy War Definitions Presented by International Lawyers in the Period from 1900 to 1940*, quoted from Grob, 1949, p. 338.

For a discussion of the subjective theory see C. Eagleton: *The Attempt to Define War*. International Conciliation 1933, pp. 26 ff.; Kappus 1936, p. 36; E. Hambro: *L'exécution des sentences internationales*. 1936, pp. 55 ff.; H. Wehberg: *Das Kriegsproblem in der neueren Entwicklung des Völkerrechts*. FW 1938, pp. 143/44; T.S. Kuei: *Der Krieg als völkerrechtliches Institut, insbesondere der Kriegsbegriff*. 1945.

⁹ "On doit le constater de *jure conditio*, et n'ayant en vue que la pratique des Etats reflétant le droit tel qu'il est, c'est la volonté des Etats et rien qu'elle qui décide s'il y a une guerre ou des représailles." Strupp in *Annuaire* 1934, p. 137.

¹⁰ For references see Wehberg FW 1938, p. 143. At the outbreak of World War II, W. Grewe: *Die Bestimmung des Kriegszustandes*. ZADR 1940, p. 356, comes to the following conclusion: "Man wird nicht bestreiten können, dass die traditionelle Willentheorie, die den *animus belligerendi* eines einzelnen Staates für das Bestehen oder Nichtbestehen eines Kriegszustandes entscheiden lässt, unter den Bedingungen des heutigen weltpolitischen Systems und bei der Tendenz des modernen Krieges zur Totalität kaum noch überzeugende Kraft besitzt." Kuei 1945, p. 7, rightly observed: "Die subjektive Theorie verliert in neuerer Zeit immer mehr an Boden."

¹¹ Baty AJIL 1936, p. 396; for a compilation of authors of the objective theory of war cf. Kuei 1945, pp. 8/11. See also W. Sauer: *System des Völkerrechts*. 1952, pp. 286 ff.; H. Kelsen: *Principles of International Law*. 1952, pp. 26 ff.

Attempts have been made to reconcile this duality in the evaluation of war by combining the two aspects under consideration. Yet it became obvious that any legal conception of war is necessarily predicated upon dual consideration of war as a state of affairs and a condition. Therefore the problem which aims at elaborating a coherent and exhaustive *definition* of war can not be mastered.¹²

A place apart must be given to the doctrine and State practice of Anglo-Saxon countries.¹³ Here, Westlake¹⁴ is often considered by Continental writers as one of the fathers of the subjective doctrine of war. This assertion, however, might be a misinterpreted if it is understood in the Continental sense where the *animus belligerendi* is sufficient for the creation of a state of war. English doctrine and practice has been guided by the formula which Sir William Scott laid down in *The Boedes Lust*: "If the transactions end in hostility, the retroactive effect is directly the other way... it is declared to be *no embargo*, it is no longer an equivocal act, subject to two interpretations; there is a declaration of the *animus*, by which it was done, that it was done *hostili animo*, and is to be considered as an hostile measure *ab initio*."¹⁵

Whether one considers that the fact itself makes the state of war or whether the fact is merely indicative of the intention of the parties, British courts have generally found that the state of war begins with such acts.¹⁶ Anglo-Saxon writers are generally reluctant to subscribe in favour of either the subjective or the objective theory of war. Instead, they emphasize the universal recognition that war is a *contention*, i.e., "a violent struggle through the application of armed force".¹⁷

¹² Kappus, 1936, p. 76, concluded his monograph in stating that "war is that specific relation of States independent of one another, a struggle in which at least one side exercises the full extent of force manifesting thereby the will to employ such force" (translated by the author).

¹³ Cf. Maurel, 1907, pp. 114/16.

¹⁴ J. Westlake: *International Law*. 2nd. ed. vol. II, 1913, p. 1: "War is the state or condition of Governments contending by force." This definition was substantiated as follows: "The habit arose of regarding lawful war, that is war with all its legal effects as commenced no less by fact than by declaration, and dating it from the commencement of hostilities. By that term... if we try to put a definite meaning on it, we must understand the first act of force done with the intent of war and not with that of reprisals or pacific blockade if a war follows, or the first act of force done with whatever intent... which the State affected by it chooses to regard as one of war. (pp. 23/24)" Cf. E. Gottschalk: *Die völkerrechtlichen Hauptprobleme des Mandschureikonflikts*. ZfV 1933, p. 200.

¹⁵ C. Robinson: *Reports of Cases argued and determined in the High Court of Admiralty*. 1806, vol. V, p. 246.

¹⁶ Cf. Ronan AJIL 1937, p. 658.

¹⁷ Oppenheim-Lauterpacht: *International Law*. 7th ed. vol. II, 1952, p. 202.

Paragraph 2. The concept of "war as defined by international law".

Since the beginning of the 20th century practice and theory have concurred in speaking increasingly of *international war*¹⁸ or *war as defined by international law*.¹⁹ In opposition to this notion terms were used such as: War as considered by municipal law, *guerre au sens du droit public interne*, Krieg im Sinne des Staatsrechtes, Krieg im Sinne des innerstaatlichen Rechts,²⁰ war as understood by commercial men,²¹ kommerzieller Kriegsbegriff,²² etc.

Let us recall that the legal notion of war originated in international law, which at the outset was virtually coterminous with the law of war. Since the reconstruction of Europe by the treaties of Westphalia and Osnabruck (1648) Grotius' work '*De Jure Belli ac Pacis Libri Tres*' had become something like a code of international law for the Continent. This code stated authoritatively that war was a status. Any other meaning of war was thereby excluded in the realm of international law.

The expression of *war as defined by international law* would be meaningless but for the divergence which we noticed earlier to have appeared between the sociological aspect of war and its legal aspect under international law. The reasons for this divergence are twofold. The economic and industrial revolution of the 19th century had a great impact on the development of legal order both in the municipal and the international sense. To an increasing degree the event of war became of concern in legal transactions under municipal law. It goes without saying that the meaning of war in legal transactions such as wills, insurance policies, charter parties and other contracts may prove to be incompatible with the concept of war as a state. This is equally true for municipal law which had to refer to war. According to its purpose it will envisage either the notion of war as a state or the notion of war as a fact. The resistance in international law to modify its definition of war for the needs of modern civilization justified attempts for establishing a dichotomy of war as is expressed in the terms *war as defined by international law* and war in the sense of municipal law.

In addition, *war as defined by international law* expresses the idea that such a notion of war does not imply military reprisals, civil war and armed intervention. It excludes also currency wars, trade wars, tariff wars and 'cold war'. Rebellions, revolutions and military expeditions against supposedly 'savage tribes' are likewise not war under this definition.²³

¹⁸ C. Fenwick: *International Law*. 1948, p. 546.

¹⁹ See RGSt. 56, S. 4, 10.5.1921, where the German Supreme Court uses the term "völkerrechtlicher Begriff des Krieges"; H. Wehberg: *Hat Japan durch die Besetzung der Mandschurei das Völkerrecht verletzt?* FW 1932, pp. 1 ff. Hold-Ferneck: *Lehrbuch des Völkerrechts*. 1932/II, p. 240.

²⁰ Cf. R. Laun: *Haager Landkriegsordnung*. 1950, p. 97.

²¹ Judge Goddard in '*Kawasaki v. Bantham S.S. Co. Ltd.*' see below, p. 204.

²² R. Stöedter: *Die Rechtslage Deutschlands*. 1948, p. 210.

²³ J. Kunz: *Kriegsrecht und Neutralitätsrecht*. 1936, p. 5. See also P. Guggenheim: *Lehrbuch des Völkerrechts*. Vol. II, 1950, p. 549, "Krieg im Sinne des Völkerrechts liegt aber schon vor, wenn der eine Staat gegen den

Needless to say that the notion of *war as defined by international law* would distinguish between a formal war, i.e., a state of war, and war in the material sense. It is with this distinction in mind that the German Supreme Court committed itself to the following statement: "On August 4, 1914 a state of war in fact and according to international law existed between Germany and Russia."²⁴

*Paragraph 3. The Continental concept of war as opposed to the Anglo-Saxon concept of war.*²⁵

The historical difference between Anglo-Saxon and Continental conceptions of international law with regard to the scope and meaning of the term 'enemy' gave rise in the legal theory of the 19th century to the establishment of a so-called "Continental concept of war" which was generally specified by confronting it with the "Anglo-Saxon concept of war". The sociological background of the Continental concept of war was traced back in doctrine to Rousseau's declaration in the *Social Contract* saying that war is only a relation between States and not between individuals.²⁶ According to the Anglo-Saxon conception of war "the whole nation are embarked in one common bottom, and must be reconciled to one common fate. Every individual of the one nation must acknowledge every individual of the other nation as his own enemy, because the enemy of his country".²⁷

The doctrinal reliance on the divergence of these two standpoints used to be expressed as dealing with different *concepts* of war.²⁸ It must be admitted, however, that the divergence is essentially concerned with opinions and practice in regard to the rules of warfare. Particularly with regard to the laws of economic warfare there existed before 1914 a marked divergence between the predominantly maritime countries and the predominantly continental countries. The standpoints of these

anderen eine Unrechtsfolge in der Form des Krieges verwirklichen will, ohne dass der andere Staat eine gleichwertige Aktion oder Gegenaktion vollzieht." Laun, 1950, p. 98: "Solange es sicher ist, dass nach dem Willen der beiderseitigen kriegführenden Regierungen Kampfhandlungen zulässig sind, solange besteht ohne Zweifel Krieg im Sinne des Völkerrechts." R. Bindschedler: *Die völkerrechtliche Stellung Deutschlands*. SJIR 1949, p. 46.

²⁴ *Fontes Juris Gentium*, Series A Sectio 2 Tomus 1, p. 175 (ein völkerrechtlicher als auch schon ein tatsächlicher Kriegszustand).

²⁵ Cf. A. Mayer: *Völkerrechtlicher Schutz der friedlichen Personen und Sachen gegen Luftangriffe*. 1935, pp. 37 ff.; Kunz, 1935, p. 2.

²⁶ Chapter 4, part. 1. The classical legal precedence is generally seen in Portalis' statement at the opening of the Prize Court in Paris in 1801: "La guerre n'est... point une relation d'homme à homme, mais une relation d'Etat à Etat, dans laquelle les particuliers ne sont ennemis qu'accidentellement, non point comme hommes, ni même comme citoyens, mais comme soldats. Enfin, chaque Etat ne peut avoir comme ennemis que d'autres Etats, et non pas des hommes, attendu qu'entre choses de diverses natures on ne peut fixer aucun vrai rapport."

²⁷ Cf. Nurick AJIL 1945, p. 681, with references to court practice.

²⁸ Cf. E. Menzel: *Der 'anglo-amerikanische' und der kontinentale Kriegs- und Feindbegriff*. ZöR 1940, p. 161/63 whose marked tendential work derives from the Anglo-Saxon practice of blockade a concept of war of its own.

two blocs differed as to the determination of contraband goods, as to the penalty for breach of blockade, and in many other respects.²⁹ While Continental countries had a marked interest to limit the operation of warfare to the military conduct of armed hostilities, maritime nations emphasized very much economic warfare.

Although the Anglo-Saxon definition of the term 'enemy' goes further than that of the continental countries the former did at no time reject the fundamental distinction between combatants and civilian population.³⁰ In modern international law the different opinions with regard to the laws of economic warfare had become insignificant.

Paragraph 4. The distinction between "de facto" war and "de jure" war.

The evaluation of war in favour of either the objective or the subjective theory of war responded, there is no doubt, to the Continental state of mind. In saying that war is a *contention*, the British school offered to that controversy a kind of synthesis. The British view on this matter had started out from considerations of expediency. It was with an eye to British court practice that the concept of war had been developed rather than by academic dispute.

To the British definition of war as a contention, Moore had opposed in 1906 the definition of war as a *legal condition*, which he derived from American State practice. Says this author:

Much confusion may be avoided by bearing in mind the fact that by the term of war is meant not the mere employment of force but the existence of the legal condition of things in which rights are or may be persecuted by force. Thus, if two nations declare war one against the other, war exists, though no force whatever may as yet have been employed.

²⁹ Cf. The German decision RGZ Bd. 85, 376 (1914): "Dem deutschen Völkerrecht liegt die Anschauung gewisser ausländischer Rechte fern, dass der Krieg unter möglichster wirtschaftlicher Schädigung der Angehörigen feindlicher Staaten zu führen ist, und dass diese daher in weitem Umfange der Wohltaten des gemeinen bürgerlichen Rechts zu berauben sind. Vielmehr gilt der Grundsatz, dass der Krieg nur gegen den feindlichen Staat als solchen und gegen dessen bewaffnete Macht geführt wird, und dass die Angehörigen des feindlichen Staates inbezug auf das bürgerliche Recht dem Inländer in demselben Masse gleichgestellt sind, wie dies vor dem Kriege der Fall war, mithin, soweit nicht gesetzliche Ausnahmen bestehen, in allen Beziehungen." RGZ Bd. 93, 182: "Der Zweck der englischen Trading with the Enemy Act 1914 war, den feindlichen Handel zu treffen und damit nicht nur den feindlichen Staatsangehörigen sondern mittelbar auch den feindlichen Staat selbst wirtschaftlich zu schädigen. Dieser Zweck widerstrebt auf's erheblichste dem Grundsatz des deutschen Rechts, dass der Krieg nur gegen den feindlichen Staat als solchen und dessen bewaffnete Macht, nicht auch dessen Angehörige geführt wird, einem Grundsatz, dessen Bestand durch erforderlich gewordene Vergeltungsmassnahmen nicht berührt wird." Quoted from Menzel 1940, p. 186. Cf. H. Lauterpacht: *The So-Called Anglo-American and Continental Schools of Thought in International Law*. BYB 1931, p. 31.

³⁰ Mayer 1935, pp. 44/45. Cf. G. Leibholz: *Die völkerrechtliche Stellung der "Refugees" im Kriege*. ArchivVR 1950, pp. 129 ff. who deals in particular at pp. 135 ff. with the concept of 'enemy' in World War II.

It might legitimately be said that the predominant rôle of the Constitution in legal thought and practice of the United States has had its decisive influence on this definition. The American viewpoint on war is primarily determined by Article I Section 8 Paragraph 11 of the Constitution. It says that it is Congress which shall have the power to declare war,³¹ grant letters of marque and reprisals and make rules concerning captures on land and water. The peculiar political background of American constitutionalism gave rise to a guiding rule with regard to war: War is what has been declared by Congress in conformity with Art. I Sect. 8 Par. 11 to this effect. Ergo, war is a legal condition.

This form of American international law was bound to be insufficient at a moment when the Constitution was deprived of its effectiveness. However, as this was the case in the American Civil War, Courts were nevertheless called upon to pronounce themselves on the nature of this armed contention. On this occasion Justice Nelson elaborated a distinction between *war in the material sense* and *war in the legal sense*:

An idea seemed to be entertained that all that was necessary to constitute war was organized hostility... Now, in one sense, no doubt, this is war and may be a war of the most extensive and threatening dimensions and effects, but it is a statement simply of its existence in a material sense, and has no relevancy or weight when the question is, what constitutes war in a legal sense, in the sense of the law of nations and of the Constitution of the United States.

For it must be a war in this sense to attach to it all the consequences that belong to belligerent rights.³²

Though the majority differed from Justice Nelson in holding that the President did not need to wait for Congress to recognize war in the legal sense, they did not deny this distinction which was later utilized.³³ It is against this background that Wright tried to open up new vistas for international law when he took up afresh the distinction between *war in the material sense* and *war in the legal sense* after World War I. It is intended to clear the ambiguity of the notion of war in international law. The difference between the two terms is conceived as follows:

In the material sense, war may be considered an act or a series of acts of violence by one Government against another, or a dispute between governments carried on by violence.

³¹ This Article must not be read in the light of the Third Hague Convention of 1907 relative to the opening of hostilities. The said Article has as its sole purpose attributing the competence of waging war to Congress. It is not only by virtue of its form but also by virtue of its content, an integral municipal rule. Its similarity with a rule of international law is fallacious.

³² *The Prize Cases*, 2 Black 635, (1863).

³³ Wright: *Changes in the conception of war*. AJIL 1924, p. 761; see also *The Three Friends*, 166 U.S. 1, (1897).

In the legal sense, war may be considered a condition or period of time in which special rules permitting and regulating violence between governments prevail, or a procedure of regulated violence by which disputes between governments are settled.³⁴

The terminology of *material war* and *legal war* has been taken up by several publicists on international law without its being attributed the sense Wright has been ascribing to it. So, Ronan, in his study of British and American court practice, reaches the conclusion "that the preceding cases go far toward asserting that material war, the existence of authorized and organized hostilities between two states, creates a legal status of war."³⁵ On the other hand, the distinction made by this terminology had been taken up, but the terms replaced by those of *de facto* war and *de jure* war. In such a case, they are by and large synonymous with *war in the material sense* and *war in the legal sense*. Hindemarsch considers the topic of 'war declared and the use of force' with the remark that it calls in the final analysis for an attempt, at least, to distinguish between war *de jure* and the use of force short of war.³⁶ Bindschedler deals evidently with the same subject, but calls the distinction between the two concepts of war *Krieg im Rechtssinne* (war in the legal sense) and *Krieg im Sinne des allgemeinen Sprachgebrauchs* (war in the sense of common parlance).³⁷ These two usages, observes this author, do not cover the same ground.

In all these instances the notion *war in the legal sense* has a very precise meaning. It refers either to the concept of war as it is defined under classical international law or to the respective constitutional laws which received this notion in municipal law. *War in the legal sense* at no time meant to say 'war as envisaged by no matter what municipal or international law'. Any critic of the notion *war in the legal sense* has to pay due regard to this fact when the latter is compared with the conception of *war in the material and formal senses*. Grob evidently ignores these facts in his criticism of the notion *war in the legal sense*. As a consequence his criticisms deal with ideas which have at no time been expressed.³⁸ Kunz rejects the distinction under consideration on

³⁴ *Ibid.*, p. 755; see also Q. Wright: *When does War exist?* AJIL 1932, p. 368.

³⁵ Ronan AJIL 1937, p. 658.

³⁶ AS Proceedings 1938, p. 119.

³⁷ R. Bindschedler: *Die völkerrechtliche Stellung Deutschlands*. SJIR, 1949, p. 46.

³⁸ Grob 1949, p. 176: "It is easy enough to see that there can be no such notion as 'war in the legal sense', to wit, war in the sense of *all* the rules of law on war, both international and municipal. In order to establish the notion of 'war in the legal sense' one would have first to compile and then to interpret every single rule of law on war *ever* made. All who know anything about legal history will readily admit that it would be wholly impossible to compile all these rules on war of international law, let alone the rules on war of municipal law. Yet even a knowledge of all rules ever made would not be enough. In order to arrive at the allegedly *ever* valid notion of 'war in the legal sense' one would in addition have to anticipate and be

the ground that it does not help to develop the laws of war. He maintains that international law is inadequately developed to do away with the anomaly of 'disguised war'. That is why there is no point in his opinion in describing such a conflict as *de facto* or unofficial war, since the boundary between war and military reprisals has not yet been traced by the international law.³⁹

If we, however, replace the distinction of *war in the legal sense* and *war in the material sense* by that of *war in the formal sense* and *war in the material sense* it is for the following reason: The former distinction implies the idea that *war in the legal sense* is of relevancy under international law whereas *war in the material sense* is not.⁴⁰ This is not true. Both forms have obtained their meaning under international law. By customary international law legal consequences have been imputed to *war in the material sense* as will be shown below. It is therefore necessary to mark this evolution in international law by choosing an adequate terminology. This, we think, is to be found in the distinction between *war in the formal sense* and *war in the material sense* as it had been established by Guggenheim. It is easy enough to see that this choice in terminology expresses a considerable difference from that which is commonly understood by the concept of Wright.

The approach of Guggenheim to the modern concept of war under international law sets out from the rules of the *jus in bello* and the extent of its application. "Are the rules of the *jus in bello* — Guggenheim

able to interpret all the rules of law on war that might be made in the future. Such a proposition is so absurd as to need no comment."

P. 117: "For the above reasons, if for no other, one thing is clear. The definition of 'war in the legal sense' is impossible of achievement. It never has been achieved. It never will be. The idea of 'war in the legal sense', although handed down from year to year, from decade to decade, and even from century to century, is a futile one. No matter how teeming with wisdom textbooks on international law may be in other respects, we shall have to throw into the discard, permanently, and to forget the definitions of war which they contain." M.S. McDougal: *Peace and War, Factual continuum with multiple legal consequences*. AJIL 1955, p. 63, rightly observed: "The thrust of the Grob study is admirable but its conceptualism is often muddy, including demands for 'right' answers, and it seeks to relate definitions more to existing technical 'rules' than to particular problems, particular decision-makers, and particular policies."

³⁹ Kunz 1935, p. 11; H. Rumpf: *Der Unterschied zwischen Krieg und Frieden*. ArchivVR 1950, p. 41, declares: "Die in völkerrechtlichen Lehrbüchern weitverbreitete Begriffsbestimmung des Krieges *de jure* als eines 'Kampfes mit Waffengewalt zwischen Staaten' reicht nicht hin. Die Staatenpraxis, die im Völkerrecht normbildende Kraft hat, zeigt eine Vielfalt von nichtfriedlichen Zuständen und Vorgängen, die weder immer ein Waffenkampf sind, noch ausschliesslich zwischen Staaten stattfinden."

⁴⁰ To this effect in a recent study P.C. Jessup: *Intermediacy*. Acta Scandinavica 1953, p. 17: "I believe that the Grotian view that war is a legal condition or state, has continued to prevail. This has led to the natural legal conclusion which is at times puzzling to laymen; that not every outbreak of violence, every case of fighting, is 'war' in the legal sense."

The theory of Wright is not specific in this concern. Cf. Q. Wright: *The Outlawry of War and the Laws of War*. AJIL 1953, pp. 365 ff.; see also his opinion in AS Proceedings 1938, pp. 122/23.

asks — also applicable to military actions such as non-peaceful reprisals or such sanctions as are applied by the United Nations? In replying in the affirmative the writer is under the impression that he is in line with politico-legal tendency towards greater humanity in the conduct of armed conflicts. From the point of view of international law, theory will henceforth, in examining any given armed conflict, have to invoke as criteria *war in the material sense* and *war in the formal sense*.⁴¹

The theory of Guggenheim on *war in the formal and material senses* is based on the assumption that war in the material sense includes the following armed conflicts: (1) military reprisals such as were resorted to by Japan in China in 1931 and 1937; (2) military sanctions by international organisations as were applied in the conflict in Korea; (3) civil wars which have assumed the character of warlike operation.

We intend now to examine the foundation of Guggenheim's theory both from the standpoint of pure science and from that of State practice. If we are henceforth using the selective adjectives *material* and *formal* with regard to war it is because we will come to the conclusion that the juridical concept of *war in the material and formal senses* is not a proposal *de lege ferenda* but has already found its acceptance by customary international law. This concept is the logical outcome of the struggle against the use of a definition of war as arbitrary as it was legalistic. It is the only result possible of broadening the concept of war under international law.⁴² As a consequence, appropriate terms are provided which permit to make simultaneous reference to both 'facts' and 'legal consequences', to both the event to which decision-makers are responding and to their responses and prescriptive justifications for responses. As the principal difficulty of any conventional analysis of 'peace' and 'war' arose from the need to invoke a small number of 'absolutistic terms'⁴³ it is obvious that the concept of *war in the material and formal senses* considerably diminishes that difficulty.

In practice the acceptance of *war in the material and formal senses* is mainly due to the continuous selective application of certain rules of war⁴⁴ and to the general tendency to make military conflicts more humane.

⁴¹ P. Guggenheim: *Lehrbuch des Völkerrechts*. Vol. II, 1950, pp. 778, 780. Cf. P. Guggenheim: *Les principes de droit international public*. RdC 1952/I, p. 175.

⁴² It was certainly with this end in view that Westlake modified the classical conception when he defined war as the state or condition of governments *contending* by force. He says *governments* since the laws of war are applicable in equal measure to insurgents not recognized as States but which have received recognition of belligerency. Recognition of such rights would have been impossible had they had no government.

⁴³ McDougal AJIL 1955, p. 63.

⁴⁴ Grob 1949, p. 202, rightly points out that "reasonable questions as to whether certain operations constitute war — like reasonable assertions as to the existence of war — must needs relate to some rule of law on war, if the questioner expects a *legal answer*".

SECTION 3. THE CONCEPT OF "WAR IN THE MATERIAL AND FORMAL SENSES" DEFINED.

The concept of *war in the material and formal senses* starts out from the fact that "the essentials of war under customary international law are two. International war is a relation of one or more governments to at least one other government, in which at least one of such governments no longer permits its relations with the other to be governed by the laws of peace".⁴⁵ The distinction which has been made between legal conceptions and juridical conceptions may be helpful for an explanation of the concept in legal terminology.⁴⁶

With regard to this distinction, the concept of *war in the material and formal senses* is to be characterized as a juridical concept which in its itself is legally not defined.⁴⁷ It expresses the idea that the question of 'War or No War' can no longer be answered *in abstracto* owing to the assumption that there exists war *an sich*, i.e., war which is liable to one exhaustive definition. Henceforth that question is solvable only with regard to the intents and purposes of any of the laws of war or laws relating to war. The relativity of the existence of war in the province of international law finds expression in two legal notions, which flow from the concept of *war in the material and formal senses* and which are liable to definition: *material war* (war in the material sense) and *formal war* (war in the formal sense). If the word *war* is a reference to the social phenomenon *war*, then the epithet *in the material sense*, or more briefly, *material*, marks its introduction into legal terminology; the same is equally true for *war in the formal sense* or *formal war*.⁴⁸

The concept of *war in the material and formal senses* pays regard to both the purely objective test of war and the subjective test, which is the essence of the status theory of war. It resolves the doctrinal conflict between the objective and the subjective theories of war by the assumption that these theories are not mutually exclusive but

⁴⁵ J. Stone: *Legal Controls of International Conflict*. 1954, p. 304.

⁴⁶ Cf. R. Pound in forward to Grob, *op. cit.* p. viii who holds that a legal conception is characterized by the fact of being defined specifically by law (i.e., bailment, sale, etc.) while juridical conceptions are not defined by law. They are worked out by science of law for purposes of understanding, teaching, and applying the law.

⁴⁷ Hindmarsh, AS Proceedings 1938, p. 121, points out the "consistently vain attempts to secure a workable and acceptable definition of war".

⁴⁸ This is consistent with the statement of the International Military Tribunal in Nuremberg which made the following commitment:

"We need not attempt a definition that is all inclusive and all exclusive. It is sufficient to say that war is the exerting of violence by one state or *political organized body* against another. In other words, it is the implementation of a political policy by means of violence. Wars are contests by force between political units but the policy that brings about their initiation is made and the actual waging of them is done by individuals." *Italics added.*

Cf. Wright 1942/I, p. 8, vol. II, p. 698.

complementary. It follows that the question "War or No War" henceforth must be specified by material or formal if a legal answer is sought.⁴⁹

Paragraph 1. Material war.

The legal notion *material war* may be described as being the etymological meaning of war institutionalized in the province of international law. The term *war* derives etymologically from the Germanic word *wehr* i.e., defence, and means in all languages in one way or another a state in which a community defends its right by force.⁵⁰ The element of organized community is inherent in the meaning of war.⁵¹

In the era of the *jus bellum ac pacis* material war had been envisaged by the challenge doctrine. According to that doctrine a State which attacks another State by armed force does no more than challenge it. There will be war only if the attacked State repels force by force. If,

⁴⁹ Cf. Bindschedler, SJIR, 1949, p. 46; Stone, 1954, pp. 312/13.

⁵⁰ Cf. A. Cuten: *La notion de la guerre permise*. 1931, p. 5: "En son principe la notion de guerre contenait plutôt l'élément de résistance que celui d'attaque. On regardait et on définissait la guerre par rapport au défenseur et non pas à l'agresseur."

As the act of defense is decisive for the meaning of war in its sociological connotation, the legal notion of material war does not admit of the term 'counter war' unless it signifies a war which is consecutive to another war. Counter war in the sense of reaction to an act of aggression is, according to the concept of war in the material and formal senses, a contradiction in itself.

⁵¹ An illustration to this effect is provided in legal history with regard to the instrument of 'letters of marque and reprisal'. Down to the end of the 16th century, a considerable amount of armed hostilities was carried out at sea by privately owned ships which was not regarded as war. The hostile acts committed on both sides did not involve *ipso facto* the responsibility of the respective sovereigns.

Among the western European powers this lawless violence was gradually brought under some measure of control when the sovereign princes started to cover such privateering by issuing 'letters of marque and reprisal'. Thereby a merchant whose ship had been plundered at sea was authorized to recuperate his losses by plundering other ships if they belonged to subjects owing the same allegiance as the offender. Ships sailing with such a paper came to be known as 'privateers'. By this means privateering was gradually submitted to legal rules. Later on tribunals were set up which had to decide whether these rules had been observed in particular instances.

To the extent that former indiscriminate privateering came under the control of State authority and thereby was considered as engaging the responsibility of a political community, these armed activities were increasingly termed war. It followed that both court and State practice got used to drawing a legal distinction between privateering as a specific form of legitimate warfare and piracy. Cf. H.S. Smith 1948, p. 73; Nys 1894, p. 211; H. Wehberg: *Das Seekriegsrecht*. 1915, pp. 17, 21: "Dabei waren den Kapern eingehende Verhaltensmassnahmen vorgeschrieben, in Frankreich zuerst durch die 'Instructions aux corsaires du Roi de France' von 1584, in Spanien 1621, in England 1707."

however, it yields to the armed pressure, then no war can be said to have been initiated. In that case the challenge remains an act of coercion which occurred in a state of peace.⁵²

Material war implies a continuous clash⁵³ of arms conducted by organized armies which engage the responsibility of governments. It does not presume the condition that the belligerents must be States.⁵⁴ The existence of war in the material sense is something to be judged by evidence not of intentions, but of the activities or military forces in the field. The two may meet because the scale and objectives of military operations may give evidence of an intention to create war and even where the intention is undeniable, States may be bound by treaties not to recognize a 'state of war'.⁵⁵

⁵² Cf. Ronan AJIL 1937, p. 646. Travers-Twis declared that "jamais cour d'aucun pays n'a osé décider que les actes de parties, qui sont belligérentes *de facto* avant une déclaration de guerre, sont des actes de pirateries." *Le droit des gens ou des nations*. Paris, 1885, II, par. 38, p. 67, quoted from Maurel, 1907, p. 114.

⁵³ It follows, that material war has nothing to do with any allegorical resort to the term 'war' such as *war by boycott* or *cold war*. Although it may be true that one can starve out a nation by economic boycott and the people then will die as certainly as if killed with bullets, such operations have at no time been regarded as constituting by themselves a war in the material sense. Cf. M. Colvin AS Proceedings 1938, p. 122; Kunz 1935, p. 4; Haase, p. 15; Sauer: *System des Völkerrechts*. 1952, p. 287; Wehberg: *Krieg und Eroberung im Wandel des Völkerrechts*. 1953, p. 69.

To an opposite effect Glenn: *War without Guns*. The Virginia Quaterly Review 1932, pp. 388/99, who considers national boycott "in and of itself", as war. In what essential respect, asks that author, does a national boycott differ from a national war? "To one who may suffer through the creeping paralysis of trade slacking it will make no difference whether his country is undergoing a blockade or a boycott. Step by step, we have learned that war can be made by methods apparently peaceful" (p. 395). "Boycotting is nothing but an improvement, a late development indeed, of the art of war." (p. 390). Quoted from Walz: *Nationalboycott und Völkerrecht*. 1939, p. 98. Walz derives from the national boycott the characteristics of what he terms an "independent special form of war of hostile national boycott" (verselbstständigen Sonderkriegsform des feindlichen Nationalboycott). Cf. C. Schmitt: *Inter pacem et bellum nihil est medium*. ZADR 1939, p. 594; E. Borchard: *Dragging America into War*. Current History, 1934, p. 397.

⁵⁴ H. Hilleke: *Der Kriegsbegriff und seine Stellung in der Weltordnung*. 1932, p. 56, observes that there is no principle in law (Rechtssatz) which stipulates that war implies only a relationship between States. Nor can any such 'Rechtssatz' be derived from the notion of war in its general meaning. Rolin concluded by 1920 that the term *war* in international law was comprised by "la lutte armée entre deux Etats ou entre un Etat et un groupement politique constitué dans son sein et luttant ouvertement et publiquement contre lui." It is obvious that this broadening of the definition of war concerns only civil war. A. Rolin: *Le droit moderne de la guerre*. 1920/I, p. 144; Hambro 1936, p. 50. The *Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War* defined a belligerent in the sense of that convention either as a State or as a politically organized group. AJIL, 1939, Suppl. p. 209.

⁵⁵ Wright AS Proceedings 1938, p. 138, reports that there are 181 distinct cases where the armed forces of the United States had been used for purposes other than suppression of internal mob violence. There are as many as 34 years of American history when none of these episodes occurred, but in all of

Courts and governmental declarations have often termed as material war reprisals, interventions and insurrections if the armed contest occurred on a considerable scale. These episodes have often proceeded with all the physical characteristics of war⁵⁶ between the contending parties, but the legal situation has been very different from a state of war. Civil wars may become relevant for the application of the law of neutrality by either the recognition of belligerency or their evolution into a *de facto* international war. In all these instances "the logic of facts" proved to be stronger than the attempts to deny their character of war in the realm of law.

Although the concept of material war has become a legal notion of its own, it is also employed as a denomination for the period of armed hostilities in the course of a formal war.

As all the rules of international law which relate to the material conduct of warfare are applicable in a material war, the latter may be regarded as an instance of *ex facto jus oritur* which, however, can conflict with the maxim of *ex injuria jus non oritur*.⁵⁷

Paragraph 2. Formal war implies the existence of a state of war.

A state of war is an expression of international law defining a certain relationship between two or more States; it is a legal concept, and whether a state of war exists is therefore a question of law and not of fact.⁵⁸

In opposition to material war, formal war, which is synonymous with a state of war, is characterized by the following features: (1) a state;

the other 126 years, armed forces were used at some time without creating a 'state of war' "perhaps fighting Indians, perhaps in operations in China or the Pacific Islands."

It goes without saying that States never will admit to call any and every such instance a formal state of war (that is what Wright evidently has in mind when he speaks of 'war in the legal sense'). Yet many of these instances would, if examined retrospectively in the light of material war, have constituted war in the material sense. Wright omits to indicate which laws of war he has in mind when he draws the following conclusion:

"I do not think it possible or practicable to adopt the purely objective test and say that whenever soldiers are engaged in hostilities under orders or a naval ship is being used in active operations, that there is war in the legal sense. We would have too many of them, and often the cases are so unimportant that the tremendous legal consequences which attach to the legal state of war ought not to apply." (p. 123.) Kuei, p. 11, remarks that it is wrong to admit the existence of war only in the event that there is a state of war.

⁵⁶ One of the main characteristics in the conduct of warlike military operations is the respect of the distinction between combatants and non-combatants.

⁵⁷ Cf. Oppenheim-Lauterpacht: *International Law*. 7th ed. 1952/II, p. 197, who speaks of 'real war' instead of material war. The acceptance of material war in the province of international law falls in line with those political and legal tendencies which demand in the interest of humanity a limitation to any and every actual warfare.

⁵⁸ *Rex v. Botrill ex parte Kuchenmeister* reported in BYB 1946, p. 382.

(2) an armed conflict initiated with *animus belligerendi* of at least one of the parties to the conflict; (3) a war which is constitutive of a state of neutrality with regard to third powers not taking part in the conflict.

To say that formal war is a *state* means that military hostilities within the framework of the law of war are expected to take place. Whether or not advantage is taken of this expectation is irrelevant for the existence of a formal war. Force is a primary, but not an absolutely essential characteristic of a state of war whose initiation is regulated by law.⁵⁹ Once a state of war has come into existence, the normal rights and duties of States are converted into the extraordinary rights and duties of either war or neutrality.

As to the belligerent parties, the acts involving the killing, wounding and despoiling of human beings, the limiting of their freedom, the destruction of goods and other actions which would be criminal acts under the law of any civilised people, become permissible when undertaken by duly authorized persons in the name and under the commission of a belligerent government against an enemy State, its nationals, its territory and its goods.⁶⁰ The transfer of any such legitimacy is not affected by any rule of the *ius ad bellum*. It follows that even in the event of an illegitimate war the killing, wounding or despoiling of human beings, if operated in conformity with the rules of warfare, cannot be charged against soldiers partaking in it.⁶¹

Formal war is set up by the will to do so, i.e., the manifestation of *animus belligerendi*.⁶² Only States are conceived under international

⁵⁹ E.A. Jelf: *What is War? What is aggressive War?* Grotius Transaction 1933, p. 105: "...when it is said for instance that 'la guerre est cet état dans lequel on poursuit son droit par la force', it is not intended to imply that a state of war commences directly any force is employed, or ceases directly force ceases to be employed." Cf. Wright AJIL 1932, p. 363; Wilson AJIL 1932, p. 327; Stödter 1945, p. 113.

⁶⁰ "The killing of enemies in war is in accordance with the will of the state that makes war (whose laws as to the legality or illegality on the question of killing are decisive), only in so far as such killing is in accordance with the conditions and limitations imposed by the Law of Nations." The German Supreme Court in *Llandovery Castle* A.D. 1923/24, case No 235.

⁶¹ Cf. the border case of *In re Werner u. Gen.* ArchivVR 1949/II, p. 233: An official of the German police forces of the occupation army in Luxembourg was charged for having taken part in the pursuit of a Luxembourg subject who tried to escape from German military service. Schätzel, in commenting this case, observes: "Der Soldat, der zu einem Executionskommando befohlen wird, hat keine Betrachtungen darüber anzustellen, ob das Todesurteil des Delinquenten auch dem Völkerrecht entspricht". *Ibid.*, p. 236.

⁶² Cf. P.C. Jessup: *Intermediacy*. Acta Scandinavica 1953, p. 23: "Unfortunately, one cannot brush aside such points on the ground that they are legal technicalities. The law does deal in technicalities. Under our law, a will without witnesses is not a valid will. Certain documents must bear seal. So it may be true that international law now stipulates that armed conflict does not constitute a *state of war* unless it bears the seal of the parties' intent." (Italics added.)

Cf. Wright AJIL 1932, p. 365; C.A. Pompe: *Aggressive War an International Crime*. 1953, pp. 5/6.

law as being able to express an *animus belligerendi*.⁶³ It is manifested either by a declaration of war or by a certain overt act which international law regards to be concludent to that effect.⁶⁴ In an instance of undeclared war, *animus belligerendi*, if expressed by resort to armed force, brings about a state of war just as if war had been initiated by a declaration of war. This effect occurs regardless of the contrary desire of the other party involved.⁶⁵ *Animus belligerendi*, being a state of

⁶³ States must be recognized in order to produce by their *animus belligerendi* a state of war. When in World War II Israel, which at that time had still the legal status of a Mandate, declared war upon Germany, the latter protested against the legal effects of any such declaration. According to the press, the new State of Israel, when it was recognized after World War II, declared through its ministry of foreign affairs that "Germany's war against the Jewish people cannot be regarded as having come to an end." Cf. Schlüter ZaöRV 1950, pp. 262/64 quoted from U. Scheuner: *Die Beendigung des Kriegszustandes mit Deutschland*. ArchivÖR 1951, p. 320. When the Decrees of the National Convention announced that France was ready to come to the aid of all peoples who might wish to recover their liberties, and that should a particular people refuse the liberty offered it and retain or recall its prince or its privileged classes it would be treated as an enemy, that declaration was regarded by the European States as a political manifest rather than a weighty declaration of war. C. Fenwick: *Intervention: Individual and Collective*. AJIL, 1945, p. 648, rightly observes that this "declaration of war against the conservative world" parallels Russian Communism at its most extreme state. See also Spiropoulos: *Sur l'existence de l'état de guerre entre la Grèce et l'Albanie*. Rev. Hell, 1948, p. 375: "Tant qu'un Etat militairement occupé continue d'exister comme 'Etat' au point de vue du droit international, la volonté d'un autre Etat de créer un état de guerre avec l'Etat occupé produirait cet effet, même si ce dernier Etat, par hypothèse, aurait été incapable d'exercer sa capacité internationale." In the advisory opinion of the German government, the so-called 'Bonner Gutachten', it was declared; "Kriegszustand... kann nur zwischen Staaten bestehen, Kriegshandlungen können nur von Angehörigen des legitimen Kriegszustandes vorgenommen werden, wie es in der Haager Landkriegsordnung umschrieben ist." This is a reproduction of the law which the German Reichsgericht had found in 1914 (RGZ. 26.10.1914, Bd. 85, p. 376). Cf. Stödter 1948, p. 7; Bindschedler 1949, pp. 44 ff.; L. Delbez: *La notion juridique de la guerre*. RGDIP 1953, pp. 183 ff.

⁶⁴ J. Stone: *Legal Controls of International Conflict*, 1954, certainly is right when he observes "that it is not possible to define the intent element of the legal state of war, save in terms of the manifested intent of at least one government no longer to conduct its relations with another or others according to the law of peace. Any narrower formula confronts the inconsistent facts." (p. 306). As to the initiation of a state of war by ultimatum Senhor Paranhos remarked to Señor Elizalde on January 19, 1865: "History and the rights of nations teach us that, when international contentions reach the emergency of an ultimatum, and this is followed by the breaking off of diplomatic relations and the reciprocal employment of reprisals, the immediate consequence, foreseen and inevitable, is war" *Fontes*, No 2439.

⁶⁵ Cf. Spiropoulos Rev.Hell. 1948, p. 374; Stone op. cit., 1954, p. 305; Westlake: *International Law*. vol. II, p. 2. An example to this effect was set in 1912, when Rumania declared war on Bulgaria on July 10th. The Bulgarian government, however, declared officially that it had ordered its army not to engage in military hostilities with the Rumanian army. In addition, the Bulgarian ambassador to Rumania was directed to stay at his post. In her note of protest in July, Bulgaria qualified the Rumanian action to be an intervention. Nevertheless, a state of war was held to be in existence owing to

mind and as such just a matter of fact like any other fact, must be proved by appropriate evidence.⁶⁶

As to third parties not taking part in the conflict, formal war is characterized by the fact that it automatically brings about the state of neutrality.⁶⁷ The law of neutrality is an inherent corollary to the idea of a state of war, but a declaration of neutrality does not convert *de facto* hostilities into a formal war if both contending States deny any intention to make war. In such cases a proclamation of neutrality can do no more than establish the relationship of neutrality between the belligerent parties and the State declaring neutrality.⁶⁸ It follows that a declaration of neutrality when pronounced with regard to a material war can be constitutive of a formal war *inter partes*, but does not change the general character of that material war.⁶⁹

the declaration of war of Rumania which was confirmed in the peace treaty of Bucarest on August 10, 1913. Therein, the parties to the conflict expressed their desire "de mettre fin à l'état de guerre". Cf. K. Strupp: *Ausgewählte Kapitel aus der Völkerrechtsgeschichte*. ZfV 1913, p. 518. To a similar effect *The Nayada* 4 C. Rob 251, 165 Reprint 602 (1801). In *The Eliza Ann* 1 Dods. 244 (1813), Lord Stowell (p. 299) observed that "a declaration of war by one country only is not... a mere challenge to be accepted or refused at pleasure by the other. It proves the existence of actual hostilities on one side at least, and puts the other party also into a state of war, though he may perhaps think proper to act on the defensive only."

⁶⁶ The readiness of a State to respect certain rules of warfare in an armed conflict may be indicative of, but never has been admitted by international law as self-explanatory for the intent to wage war. Cf. Keller 1934, p. 37. For a dissenting opinion see Hold-Ferneck: *Lehrbuch des Völkerrechts*. Vol. II, 1932, p. 240.

As a rule the existence of *animus belligerendi* cannot be assumed in the face of denial of a State. On the other hand, as Stone remarks (*op. cit.*, p. 306) "mere verbal disavowal of the intent to set up a state of war may not be conclusive if the acts taken can only be explained by assuming such an intent, the disavowal being inspired by collateral motives." Cf. Wehberg, FW 1938, p. 142; Pompe 1953, pp. 4/5.

⁶⁷ Cf. Guggenheim *Lehrbuch* II, pp. 779, 983. A state of neutrality, however, may also be possible with regard to a civil war. Cf. E. Castrén: *The Present Law of War and Neutrality*. 1954, p. 423. In 1864 Sr. Salvador de Távira observed to Sr. Alvaro Covarrubias with regard to the hostilities between Peru and Spain "no puede haber neutrales donde no hay beligerantes" *Fontes* No 2444. He was answered that "no... es necesaria la notificación oficial de la declaración de guerra para que un Estado se reputé neutral entre dos Naciones que han roto las hostilidades." *Ibid.*, No 2445.

⁶⁸ Eagleton: *The form and function of a declaration of war*. AJIL 1938, p. 26; Kappus 1936, p. 68; Wilson AS Proceedings, 1938, p. 117: "For a third State to proclaim two or more foreign States to be at war prior to any declaration by these States, and to list other States as neutral, is to introduce new and unfortunate complication into international relations." To an opposite effect Wright AJIL 1932, p. 367.

⁶⁹ In 1927, the Secretary-General of the League of Nations drew attention to the possibility of situations in which there is no formal state of war between the disputants, but in which third States may find it necessary to guide their conduct by the view that a state of war exists. Doc. A. 14, 1927, V, p. 83. In pursuance of this evolution Lauterpacht declared at the opening of the Manchurian dispute: "It would thus appear that there are two ways of bringing about an internationally relevant state of war. One follows

Any international conflict developing into war takes the shape either of a material war or formal war. The bulk of the laws of war as well as the legal stipulations which refer to war can be concerned with either of these concepts or with both of them.⁷⁰

War in the formal sense is comprised by all regulations relative to the conduct of warfare, by the rules of economic warfare, by questions of rights with respect to contracts and those of property at sea. There is a host of other situations, the legal solution of which depends upon whether or not there is a state of war that is, war in the formal sense.⁷¹ The meaning to be attributed to such expressions as war, hostilities, warlike operations when occurring in policies of insurance, charter parties or other written contracts, is not necessarily to be derived from the concept of war in the formal and material senses. Any such reference may not be referring to judicial concept at all. It is a matter for inquiry

upon the express or implied *animus belligerendi* of the disputants; the other is created by third states ignoring the unwillingness, or inability, of the disputant parties to engage in formal war. These two kinds of war differ not only in the matter of their origin, but also in their legal results. The first brings about consequences both as between the belligerents and as between themselves and other states. The second concerns only the relations between the third states and the parties in dispute." H. Lauterpacht: '*Resort to War*' and the *Interpretation of the Covenant During the Manchurian Dispute*. AJIL 1934, p. 53.

⁷⁰ In State practice, numerous bilateral treaties have been concluded engaging the contracting parties not to expatriate the subjects of the other party in case of war. Any such treaty refers generally to both, material and formal wars. Cf. Kunz 1935, p. 45.

⁷¹ In the *Eastern Greenland Case*, for instance, the Permanent Court of International Justice examined whether the term "conquest" could be used regarding the fighting between the European settlers and Eskimos which led to the downfall of the early Danish settlements. In this connection, the Court held: "Conquest only operates as a cause of loss of sovereignty when there is war between two States and by reason of the defeat of one of them, sovereignty over territory passes from the loser to the victorious State." Series A/B 53, p. 47. G. Schwarzenberger: *International Law*. 1949, vol. I, p. 141, holds the view that it does not appear that this dictum "countenances the doctrine of the automatic transfer of territory by virtue of conquest pure and simple." Under the statutes of the United States commercial and other relations with an "enemy" are illegal but these statutes are applicable only when a formal state of war exists. See Jessup *Acta Scandinavica* 1953, p. 17.

In the matter before the Mixed Claims Commission between Great Britain and the United States over the *Richards Claim* the Commission had to consider the meaning of the phrase 'at war' in Section 2 of the Act of the United States Congress of March 2, 1907 which runs as follows:

"When any naturalised citizen shall have resided for two years in the foreign state from which he came, or for five years in any other foreign state, it shall be presumed that he has ceased to be an American citizen, and the place of his general abode shall be deemed his place of residence during said years:

Provided, however, that such presumption may be overcome on the presentation of satisfactory evidence... and provided also, that no American citizen shall be allowed to expatriate himself when the country is at war." Quoted from Schwarzenberger 1949, p. 167. The meaning of 'at war' in that context obviously refers to a formal war.

in each case whether that term is used in one of the senses of international law, or in some specific municipal legal sense or merely in a popular sense.⁷²

So far as war is dealt with in Constitutions relative to its initiation and its termination there is a presumption that the respective laws refer to formal war only.⁷³

⁷² Stone 1954, p. 304; Borchard AJIL 1933, p. 115, remarks with regard to fire insurance policies; "Is it not a strange doctrine that would make the existence of war depend on recognition by anybody? Pending suits on fire insurance policies, in which the insurance company claims exemption from liability on the ground that the injuries in and around Shanghai arose out of 'war' or 'acts of war' may place this issue to the test." Yet there is no general rule to the issue at stake. Whether a fire insurance policy refers only to formal war or to material is purely a matter of interpretation from the context of any such treaty. Cf. McNair: *Legal Effects of War*. 1944, p. 256; Fischer Williams, Cambridge L.J., 1933, p. 18, holds that "war in a treaty should mean what it means to ordinary people".

⁷³ Some Constitutions prohibit resort to war without any further specification, others refer to 'war of conquest' (Art. 88 of the Constitution of Brazil of 1891) or 'war as a means of national policy' (Art. 211 of the Constitution of Burma of 1947). Resort to war was expressly renounced in the Spanish Constitution of 1931. Art. 71 of the Constitution of 1946 of the French Union goes to the same effect. For an interpretation of Art. 26 of the Bonner Grundgesetz see O. Kranzbühler: *Nürnberg als Rechtsproblem*. 1950, p. 231. Cf. Castrén 1954, p. 47; B. Mirkin-Guetzevitch: *Les tendances internationales des nouvelles constitutions*. RGDIP 1948, pp. 379/80. Cf. Calogeropoulos 1950, pp. 122 ff. The laws of the American Constitution which regulate the initiation of war obviously deal with war in the formal sense. The Constitution provides that only the Congress shall have the power to declare war. On the other hand there is little doubt that the President has been recognized the right, exercised frequently in the past, to utilize the armed forces for the defense of national rights and interests, which in many instances gave rise to a waging of war in the material sense. Hence the legal right and the practical power of the President of the United States to put into operation the country's armed forces outside of the United States has been a subject of considerable discussion. The question at stake was whether or not the Presidential use of armed force contradicted the terms of the Constitution according to which only Congress was entitled to initiate war.

From the standpoint of modern international law the competence to initiate war under the American Constitution must be considered differently according to whether formal or material war is concerned. While the competence of the Congress to initiate war is concerned with war in the formal sense, the President, owing largely to his position as Commander-in-Chief, is entitled, if need be, to engage his military forces in material war. Cf. P. Potter: *The Power of the President of the United States to utilize its armed forces abroad*. AJIL 1954, pp. 458/59:

"The fact is that the provision of the Constitution mentioned poses very largely a verbal problem, as does that other provision of the Constitution relating to 'treaties'. In the latter case the Supreme Court has held that — to paraphrase Gertrude Stein... — a treaty is a treaty is a treaty; in other words, if you don't call it a treaty (or perhaps make it look too much like a treaty) it isn't. So here, perhaps, if the military action involved isn't called 'war', it isn't war... The fact is that the term 'war', if not, alas, the phenomenon, may be nearly obsolete. Military operations of various kinds may have to be undertaken in the future apart from certain surviving

*Paraph 3. The rôle of material war with regard to formal war.*⁷⁴

The admission of war in the material sense as a legal notion of its own can be said to amount to the recognition of the objective theory of war alongside the subjective one. Material war has sometimes been referred to and in fact was called a 'war without a state of war'. This means that such a state of affairs cannot be without any relevancy in the province of law even if the contending parties are not States or if they deny categorically their intention of waging war.⁷⁵ As a rule, the continuance of acts hostile in character but done without warlike intention, if resisted by the affected government, is liable of bringing about, *ipso facto*, a war in the material sense which in many respects has become material in the province of international law.

The development of material war as a legal notion of its own arose from situations where the attacker on the one hand denied any intent of waging war and the defendant party on the other claimed that it was only exercising its inherent right of self-defence.⁷⁶ It goes without saying that material war very often resulted from resort to armed reprisal which, though resisted by military forces, was maintained in order to secure its goal.⁷⁷ Nowadays it is recognized with regard to reprisals that

if the State against which they are directed yields to the pressure put upon it, and redresses the grievance complained of, the pressure is removed and the incident is closed. The State in question is,

cases of war in the narrow sense. But the eighteenth-century prescription may be unsuited to the age of the United Nations and North Atlantic Treaty Organization; perhaps indeed we do need a Constitutional Amendment."

⁷⁴ Cf. Guggenheim: *Les principes de droit international public*. RdC 1952/1, pp. 174 ff.

⁷⁵ To an opposite effect Gottschalk ZfV 1933, p. 206: "Es kommt, wie Strupp zutreffend bemerkt, daher "auf den objektiven Tatbestand, d.h. das Vorliegen von Feindlichkeiten so lange nicht an, als keiner der angeblichen Kriegführenden einen Kriegszustand als vorliegend erachtet". Es gibt eben "Scheinkriege", die rechtlich nicht als Krieg gewertet werden können." But see Eagleton 1933, p. 283: "While it remains true that one state alone can produce a state of war, it is also true that neither, nor both, of the belligerents can establish the non-existence of war." This has become nowadays the dominant doctrine. Cf. J. Ray: *Commentaire du Pacte de la Société des Nations*. 1930. Wilson AJIL 1932, p. 328; Stone 1954, p. 313.

⁷⁶ In the communication dated February 1, 1932 to the Secretary-General of the League of Nations (J.O., 1932, p. 392) the Chinese government declared: "China has not declared war upon Japan, but only is exercising right of self-preservation which is inherent in sovereignty of Chinese State... In face of persistent and merciless attack, Chinese Government has been compelled adopt necessary measures of self-defense." Anglo-Saxon countries have been particularly pronunciative upon the right of self-defense as a right "inherent in every sovereign state and implicit in every treaty". Cf. Schwarzenberger, AJIL 1943, p. 476.

⁷⁷ Cf. F. de Martens: *Traité de droit international*. 1887 vol. III p. 161; L. Keller: *Die nichtkriegerische militärische Gewaltmassnahme*. 1934 p. 29 with reference to Gonzalez Hortoria Y Ladreda; L. Strisower: *Der Krieg und die Völkerrechtsordnung*. 1919 p. 10.

however, fully entitled, if it shall so choose, to resist instead of yield to the pressure. In that case, with or without any formal declaration of war, the two Powers are at war.⁷⁸

In order to distinguish a situation of this kind from formal war, it may be said that the two contending parties are *at war* but not in a *state of war*.

The concept of material war goes beyond that of formal war inasmuch as it deals not only with States but also with governments if they exercise effective control within a certain political entity. Such a political entity may have developed as the result of insurrection within a State; it may be an army acting against the orders of its government or without being authorized by the latter. It may also be an international army constituted for specific police actions. It is fair to say that in the course of the 19th century armed intervention⁷⁹ was increasingly regarded as material war if it had been resisted by an organized group within the State affected.

In legal writings material war has very often been considered under the question 'When does war exist?' and specifically with regard to the 'legal consequences of undeclared hostilities'. It is another essential feature of material war that it is self-supporting with regard to the status of neutrality, i.e., a war in the material sense does not automatically bring about a relation of neutrality for those States which do not partake in the conflict. Hence, third States are free to maintain the State of peace with the contending parties or to declare their neutrality which produces its effect *inter partes*.⁸⁰ In a material war between States, however, third States retain their freedom of action only so long as either belligerent does not deprive them of it by formally declaring war upon his adversary.⁸¹ Declarations of neutrality with

⁷⁸ E.T. Holland: *Studies in International Law*, 1898, p. 132.

⁷⁹ Cf. Ronan, AJIL 1937, p. 652; A.E. Hindmarsh: *Force in Peace*, 1933, p. 93. Fenwick, AJIL 1945, p. 647, n. 9 points out that "a number of the older jurists who condemn intervention in absolute terms do not distinguish between intervention accompanied by war and intervention effected by the use of armed force without resort to war".

⁸⁰ Grewe, ZADR 1940, p. 355, after an examination of the American Neutrality Act of November 1939, comes to the conclusion that "aus der Nichtanwendung des Gesetzes kann nicht mehr zwingend gefolgert werden, dass die Vereinigten Staaten gewisse tatsächliche Feindlichkeiten zwischen anderen Mächten nicht als Krieg im Rechtssinne betrachten. Zweierlei scheint in dieser neuen Umgrenzung des präsidentiellen Ermessens zum Ausdruck zu kommen: Einmal die Auffassung der Vereinigten Staaten, dass ein irgendwo ausgebrochener Kriegszustand sie nicht notwendigerweise in die Rolle eines "Neutralen" versetzt, dass es vielmehr neben der "Neutralität" noch einen anders gearteten Zustand der Nichtkriegführung gibt. Zum anderen scheint die neue Formulierung jedoch auch Ausdruck der Schwierigkeiten zu sein, das Bestehen oder Nichtbestehen eines Kriegszustandes zwischen fremden Staaten festzustellen." Cf. Guggenheim, Lehrbuch II, p. 979.

⁸¹ Oppenheim-Lauterpacht IntL 1952, p. 293, holds that in a case of "an actual contest of wide dimensions between the armed forces of two States the attitude of third countries is probably not of decisive importance for the legal qualification of the contest which, as between the belligerents, must

regard to material wars only give evidence to the prior existence of war but are not constitutive of war.

The concept of war in the material sense has also the function of classifying a formal war into its two stages, namely the stage where armed hostilities are in progress and the stage where there is a formal war 'short of hostilities'. The termination of material war in the course of a formal war produces certain legal consequences, above all with regard to the rights and duties of neutral powers.⁸²

SECTION 4. THE COMMUNIST CONCEPTION OF WAR IS COMPATIBLE WITH THE LEGAL CONCEPT OF WAR IN THE MATERIAL AND FORMAL SENSES.

*Paragraph 1. International law in the light of the Communist doctrine.*⁸³

The fundamental conception of law in the Communist ideology is that it must be class law, i.e., a system of rules, the content of which is exclusively to be derived from the maxims of Communist theory. Accordingly, international law will not become genuine law until the establishment of the Communist World Government.

Since the early 1920's however, efforts have been made by the U.S.S.R. to recognize international law as a mediating force in the relationships between Communist states and "bourgeois" states⁸⁴ without injuring the hypothesis of 'law being a class law'.⁸⁵

The very fact of such a class of economic and political relationships between the state of the proletarian dictatorship and a bourgeois state as are packed into the form of international law

be regarded as war for the purpose of International Law. But it is not clear to what extent an undeclared war of this nature imposes upon third States the obligations of neutrality. They may, if they wish to, announce their neutrality and thus bring into operation the resulting rights and obligations." Cf. Keller 1934, p. 20.

⁸² G.G. Wilson: *Use of Force and War*. AJIL 1932, p. 328: "There may, therefore, be a state of war without the use of force or after the force has ceased, or there may be the use of force without a state of war. The physical results of the use of force may be the same in all cases, but the legal results are clearly distinguished." Cf. Stone 1954, p. 306.

⁸³ Babb-Hazard: *Soviet Legal Philosophy*. 1951; A. Nussbaum: *Historia del Derecho Internacional*. 1949, pp. 317 ff.; E. Margolis: *Certain aspects of the impact of Communism on international law*. 1951; L.B. Schapiro: *The Soviet Concept of International Law*. Yearbook of World Affairs. 1948, pp. 272 ff.; J.N. Hazard: *Law and Social Change in the U.S.S.R.*, 1953; I. Lapenna: *Conceptions soviétiques de droit international public*, 1954; H. Kelsen: *The Communist Theory of Law*. 1955.

⁸⁴ Unless otherwise indicated, this term will be used to signify a State in the classical, pre-Communist sense.

⁸⁵ Cf. Eugene Korovin: *Sovremennoe Mezhdunarodnoe Publichnoe Pravo* pp. 8/9 in Hazard: *Cleansing Soviet International Law of Anti-Marxist Theories*. AJIL 1938, p. 245: "As the single source of international law in the first meaning of this term we recognize class (at a given state in the historical process) consciousness of the ruling groups as the source of all existing law, including international law."

— into the form of compacts and accords of every sort, and so forth — I associated with the famous thought of Lenin concerning the point that the struggle of the proletarian revolution — the struggle of the first proletarian state with capitalist encirclement — inevitably includes temporary compromises. These economic and political relationships with the capitalist world — insofar as they are subjects for mediation in the shape of international law — seemed to me specifically compromise relationships.⁸⁶

In 1937, the U.S.S.R. had reached the climax of the struggle for power between two opposing factions within the Communist party. One group believed that, with socialism established in one country, the party should temporarily abandon the overt struggle against the political systems of other countries; it urged that the government work in closer collaboration with non-Communist states in order to consolidate the power of the young socialist state. The other group wished the Russian Communist party to continue the immediate fight for world socialism with the help of its supporters in foreign countries. As the former faction won, it became an essential part of the Russian foreign policy to convince the outside world of the good faith of the U.S.S.R. in honouring her international obligations.⁸⁷ This shift in tactics did not affect the foundation of the Communist concept of international law. Only the interpretation of the latter was changed and Pashukanis' viewpoint was replaced by that of Korovin. In the works of both Korovin and Pashukanis, one finds statements which seem to show a grasp of the essential idea of Marxian legal thought, i.e., that law is a class tool, and international law, as an extension of internal law, must likewise perform its part in the struggle between classes.⁸⁸

Like any other law, international law reflects the will of the ruling classes. The reality of international law, however, is not obviated by the fact that for the time being there are on the international stage bourgeois states as well as feudal and socialist ones. Each of them, implementing its own approach and directed by its own motives, may be interested in supporting and preserving a certain portion of generally binding legal norms in international relations.⁸⁹

Consistent with this new approach to the nature and role of international law, the latter has been redefined as the "sum-total of legal norms guaranteeing international protection of the democratic minimum".⁹⁰ The recognition of international law as law in the absence

⁸⁶ E.B. Pashukanis: *Soviet State and Revolution in Law*, in Babb-Hazard: *Soviet Legal Philosophy*, 1951, p. 245. Cf. also A.N. Makarov: *Die Völkerrechtswissenschaft in Sowjetrussland*, ZaöRuV, 1936, p. 495.

⁸⁷ Cf. Schapiro, 1948, p. 281.

⁸⁸ Cf. J.N. Hazard AJIL 1938, p. 245; Lapenna 1954, pp. 63 ff.

⁸⁹ E. Korovin in *Bolshevik*, October 1946; quoted in Margolis 1951, p. 14.

⁹⁰ E. Korovin: *The Second World War and International Law*. AJIL 1946, p. 743. Cf. Maurach: *Das Kriege recht vom Blickpunkt der Sowjetunion*. Jahrbuch f. internationales und ausländisches öffentl. Recht, 1949, p. 738. Margolis 1951, pp. 17/18 observes rightly that "although there may be little

of Communist World Government became justified by its implied possibility of infusing Communist principles into that law. But it has only been with the conclusion of the Second World War that the U.S.S.R. has been in a sufficiently strong position with respect to the non-Communist portion of the world to proclaim this openly as being part of the warp and woof of its doctrinal approach to international law.⁹¹

By 1947 Korovin declared that for 30 years of its existence the U.S.S.R. unswervingly rejected and exposed those international laws, norms and institutions which "expressed imperialist privileges, inequality and international subjugation. It injected into the historically compounded forms of law a new, consistent democratic meaning and created new, most progressive international legal forms, fighting for the integration of them into international usage".⁹² According to Prof. Graham, however, about two thirds of traditional international law has already been accepted as offering workable bases of arrangement and peaceful co-existence between the Communist and the non-Communist world.⁹³

Summary: There is little doubt that international law is today considered by Soviet theorists as well as by Soviet State practice to be genuine law. While the U.S.S.R. accepts the existence of international law, however, she reserves the right to deny the application of some of its principles and rules. It is therefore necessary to examine whether the legal conception of war in the formal and material senses is compatible with Soviet doctrine and Soviet State practice.

Paragraph 2. The function of war in the Communist doctrine.⁹⁴ How to approach it for the purposes of legal evaluation.

Although war occupies a predominant role in Communist theory, until the present it was taken into consideration only from a political point of view. Soviet theorists, in dealing with war, spent most of their time interpreting the political function of war, rather than construing a legal theory of war, the pattern of which might be comparable to those of the non-Communist States. The fundamental notion of war was laid down by Lenin and still remains, the accepted theory no matter what aspect of war is under consideration.

question as to the divergence in point of view between Communist and non-Communist countries as to this democratic minimum, there is equally little doubt that this divergence is much too often, particularly in the political context of cold war, overestimated... The leading jurists of the USSR agree that the area of consensus among the countries of the world with respect to the principles of international law is quite considerable."

⁹¹ Cf. Margolis 1951, p. 14.

⁹² E. Korovin in *Pravo*, November 1947, No 11, p. 32 quoted in Margolis 1951, p. 131.

⁹³ See Margolis 1951, p. 17/18.

⁹⁴ S. Taracouzio: *The Soviet Union and International Law*, 1935, pp. 311 ff. B. Friedl: *Les fondements théoriques de la guerre et de la paix en U.R.S.S.* 1945.

War, says Lenin, is a continuation by means of force of those politics which were carried on by the ruling classes of the warring states long before the war. Peace is a continuation of the same politics, including the changes in the relations between the adversaries which are created by military actions. War *per se* does not change the direction in which the politics was developing prior to the war, but it accelerates its development.⁹⁵

This statement of Lenin obviously refers to the doctrine of Clausewitz about war. The assertion of the latter that there exists a direct connection between peace and war was many times underscored by Lenin. But from the very outset it was observed by Communist writers that the formula of Clausewitz 'does not deal with the question of class nature of politics and does not dwell upon the social significance of wars'.⁹⁶

What Lenin and his successors have added to Clausewitz — and this is the most crucial significance in attempting to comprehend the Communist approach to war and neutrality as legal principles — has been a specifically Marxist interpretation of the term 'politics'. In this manner, the conception of war is converted from the epistemology which characterizes war as 'only caused through the political intercourse of governments and nations' to one which adheres to the principle that 'the social character of war, its true significance, is determined by the kind of politics which the war continues, which class and which objectives are governing it'.⁹⁷

The changes in interpretation of Communist doctrine, which have occurred since Lenin, did not affect substantially the Communist concept of war.⁹⁸

For the purpose of our study, the Communist approach to war as a legal concept is to be limited to the two subjects where appropriate material is to be found:

- (1) The Communist civil war doctrine;
- (2) the U.S.S.R. State practice with regard to the definition of aggression.

1. *The Communist civil war doctrine.*

The civil war doctrine as part of the Communist ideology constitutes from the legal point of view a new approach to the concept of the *Jus ad bellum*. The postulate of class struggle, by means of which the Communist International is expected to be brought about, assumes resort to an eventual war. War as class struggle is termed "civil war",

⁹⁵ Vladimir I. Lenin: *Sochineniya*, vol. XIX, 1916-1917; in Margolis, p. 315.

⁹⁶ Durdenevsky and Krylow: *Mezhdunarodnoes Pravo*, 485; in Margolis, p. 315.

⁹⁷ Margolis 1951, p. 315.

⁹⁸ Cf. Maurach, *JahrbuchiaöR* 1949, p. 738.

the identification of which is ascribed to Marx.⁹⁹ In theory, politics for a Communist are focused upon class differentiation, which in its turn is the genesis of the struggle between the classes. In the event the class struggle takes the shape of a military contest it is called 'civil war'.

The Communist meaning of the term 'civil war' is not synonymous with the legal significance of civil war as understood by non-Communist States. Civil war, according to Communist doctrine, can be consistent with a civil strife between insurgents and its parent State as well as with a war between two or several States. What alone characterizes a civil war in the Communist doctrine is its cause, which must consist of a class struggle. This specific meaning of civil war is held to be derived from Clausewitz's definition of war.

Another importance of the definition of war given by Clausewitz is the explanation which it affords of Lenin's theory of the transformation of war in the classical sense, i.e., imperialistic war waged by capitalists, into civil war between classes, and *vice versa*, the change of "nationalistic" or "revolutionary" wars into imperialistic wars. It is in accordance with this theory of Lenin that the civil war following the Brest-Litovsk Treaty of 1918 was viewed by the communists as a normal outgrowth of Russia's participation in the World War and that the revolutionary wars waged by the Baltic provinces of the former Russian Empire were finally regarded by the Soviets as imperialistic struggles.¹⁰⁰

The Communist concept of war as necessarily being a civil war has not been altered by the participation of the U.S.S.R. in World War II. The only natural war from the Soviet viewpoint remains the armed clash between rival classes, such as the Russian civil war of 1917-1920. The war of 1941-1945 must be regarded as not typical, but only as an inevitable contest paving the way for Communism.¹⁰¹

The civil war in the Communist sense is by definition a just war. According to Lenin it will assume the characteristics of a war for emancipation from slavery or from the yoke of the capitalists. These always just wars must necessarily take place, for the working class 'cannot secure its emancipation except by a struggle'.¹⁰² So, it is evident that the Communist doctrine of the just war is nothing else but the political theory of class struggle provided with a legal content. As the Communist concept of war, in its origin, did not include any distinction between the ideological, political and legal aspects of war,

⁹⁹ Cf. P.I. Stuchka: *The revolutionary part played by law and the State*, in Babb-Hazard: *Soviet Legal Philosophy*, p. 45. This affirmation, Stuchka comments it as follows; "And if various socialist-traitors are now preaching a profound difference between class struggle and civil war, they not only do not know Marx: they do not wish to know him, and are serving the interest of the class of capitalists." See also Lapenna, 1954, pp. 236/42.

¹⁰⁰ Taracouzio 1935, pp. 314/15.

¹⁰¹ Cf. Maurach, *JahrbuchioöR* 1949, p. 739.

¹⁰² Lenin: *Collected Works*, in Margolis, p. 315. Cf. also Frankenstein: *L'Organisation des Nations Unies devant le Conflit coréen*, 1952, p. 331.

its legal meaning was to be specified later with the help of the criteria for 'aggression'.

Does the Communist concept of war have anything in common with that of the non-Communist States? The answer must be sought separately in the field of Soviet doctrine and U.S.S.R. State practice.

As to the doctrine, it was made crystal clear very early that the "bourgeois" conception of war is incompatible with Communist ideology. In addition to doctrinal arguments, Korovin declared that modern war had become an economic operation on a very large scale so far as its goal and its means of execution were concerned. From this fact he drew the conclusion that all former juridical classifications of war will become bare of any real significance.¹⁰³

The Leninist trichotomy of all wars distinguishes (1) wars between the imperialist States; (2) national revolutionary wars against imperialists, counterrevolutionary wars, and their inverse; (3) wars directed towards the conquest or retention of colonies. Under this classification, only those wars are relevant which are people's wars, i.e., just wars, *ergo* class struggle. The ideological concept of the "people's war" was elaborated in Communist legal doctrine. A people's war can be waged either as a war between organized armies in the open field or as guerrilla war. The former is defined as the organized warfare of broad masses of the people. Guerrilla war is said to be those military hostilities which are carried on by small troops. These guerrilla troops may even be broken down into smaller groups for convenience. The military contest of these small groups is held to be war so long as they defend 'with systematic consistency the interest of the people, which are the same as the interest of the State under Soviet condition'.¹⁰⁴

In its doctrinal form, the Communist concept of war hardly admits a comparison with the non-Communist one. It would scarcely make sense to the non-Communist lawyer were it not illustrated by certain Soviet State practice. The latter gives evidence that the U.S.S.R. considers herself free to espouse the traditional concept of war if need be. For that reason she does not commit herself to anything like a 'legal notion of war'. Her way of considering war, however, implies certain juristic elements which are derived from the Communist civil war doctrine. What are they?

First, there is an element of 'legality', which serves two ends: (1) Any State or group of States taking hostile action against the Soviet bloc shall appear as the aggressor in international law.¹⁰⁵ (2) Any war waged by the Soviet bloc against a 'bourgeois' political entity is *per se* a just war.

¹⁰³ E.A. Korovin: *Völkerrecht der Übergangszeit*. 1929, p. 122: "Es ist klar, dass bei einer solchen Evolution des Krieges alle früheren juristischen Klassifikationen sich verwischen oder illusorisch werden." See also his critics on the 'bourgeois' notion of war, *ibid.*, p. 121. Cf. Kelsen 1955, p. 167.

¹⁰⁴ I.P. Trainin: *Questions of Guerilla Warfare in the Law of War*. AJIL 1946, p. 558.

¹⁰⁵ Cf. Hazard 1953, p. 276.

Second, there is an element of 'equality' putting international war and civil war in the non-Communist sense on the same level. Furthermore, the traditional distinction between open warfare and guerrilla warfare is rejected.¹⁰⁶

When the U.S.S.R. started to recognize certain laws and customs directed towards the humanization of warfare, she maintained the 'classical' Communist conception of civil war and its abovesaid legal implications.¹⁰⁶ Did the Communists really recognize the binding force of humanizing rules of warfare in civil wars in the non-Communist sense? Soviet authors have not specifically dealt with this question. It became generally accepted in their doctrines, however, that they might deal indifferently with war between States (international war), guerrilla war and civil war in the non-Communist sense, provided that these wars had the ideological character of class struggle. In theory, the conclusion can legitimately be drawn that the Communist recognition of certain rules and customs of war extends to civil war (in the non-Communist sense).¹⁰⁷

The practice of the U.S.S.R., however, is more conclusive on this point. From a very early stage of her existence onwards, Soviet diplomacy took into account war in the material sense, i.e., any military contest between political entities others than States. So, on November 25, 1921, certain rules of neutrality were confirmed by a treaty entered into by the Ukrainian S.S.R. and the Estonian Republic. The prohibition of military aid was to be applicable to "governments who are in an actual state of war with the other contracting party, or *organisations and parties (groups)* (italics added) whose object is to engage in warfare against the other contracting party".

A certain adoption of the non-Communist terminology of war and neutrality occurred to the extent that the U.S.S.R. found it necessary to collaborate with 'bourgeois' States in the framework of the League of Nations. She then was anxious to explain herself in terms which are familiar to the Western World. The civil war in Spain of 1936-1939 was qualified as 'war' with the comment that 'the struggle of which was not one of form but of substance'.¹⁰⁸ Rights as a neutral were then claimed in support of Soviet assistance to the Spanish Government and again in order to send arms to China in the early days of her fight with Japan.¹⁰⁹

¹⁰⁶ It must be observed, that the Communist civil war doctrine, at the very outset, rejected the traditional concepts of 'combatants' and 'prisoners of war', a fact which Korovin justified in the 1920's as follows: "Wir haben festgestellt, dass die einzige Kriegsart eines sozialistischen Staates seine Klassenselbstverteidigung ist und dass umgekehrt seitens der bürgerlichen Welt der Marsch gegen das Sowjetland vor allem ein 'Kreuzzug' gegen die Hydra der Weltanarchie, des Revolutionsherdes und sonstiger Alpdrücke der bürgerlichen Ruhe sein wird. Daher das natürliche Auseinandergehen im Begriffe der Combattanten und der Gefangenen." *Op. cit.*, p. 124.

¹⁰⁷ Cf. Maurach 1949, p. 739, footnote 9, who keeps maintaining that the civil war doctrine does not admit any respect of the conquered.

¹⁰⁸ Trainin AJIL 1946, p. 560.

¹⁰⁹ Hazard 1953, p. 289.

In connection with the adherence of the U.S.S.R. to the League of Nations in 1934, Trainin remarks that it was also natural that the U.S.S.R. recognized all laws and customs of war, had insisted on their observance, since they were directed towards the humanization of warfare. Soviet Russia even committed herself to the statement that, from the point of international law, belligerent States have no right to use any and every form and method of war, but only those which are not forbidden by international agreements. Ever since it has been reiterated that the U.S.S.R. adhered to all proposals 'which could mitigate the consequences of destructive (sic!) wars, the main weight of which falls on the mass of the people'.¹¹⁰

Since the end of World War II, the U.S.S.R. has grown from a position of weakness to the stature of one of the great powers. This powerful position enabled her to take up again officially her civil war doctrine which she tried to carry through in the Security Council of the U.N. at the outbreak of the war in Korea.¹¹¹

II. *The U.S.S.R. State practice regarding the definition of aggression.*¹¹²

The protection of Soviet territory from attacks of "capitalist" States became one of main targets of Soviet diplomacy in the post World War I period. As the U.S.S.R. succeeded in freeing herself from the diplomatic isolation of 'capitalist encirclement', she attempted to write into international law principles which might protect Soviet territory from military attacks.¹¹³ The U.S.S.R. supported vigorously any initiative for the outlawry of war without committing herself to any definition of this term. By the Protocol of August 27, 1928, signed by Estonia, Poland, Rumania and the U.S.S.R., immediate effect was given to the outlawing of *war as an instrument of national policy* as provided by the Pact of Paris. In order avoid any eventual legitimate resort to war under this Pact, the U.S.S.R. negotiated in the early 1930's a series of non-aggression treaties with all of her neighbours except Japan.

In connection with these treaties of non-aggression, the U.S.S.R. thought it necessary to define aggression. For a considerable period of time she attempted to secure the universal acceptance of her so-called "Litvinov" definition and prohibition of aggression. The latter was formally incorporated in the London Convention of July 3, 1933, as a generally recognized principle of international law. Nearly all her neighbours adhered to this Convention.¹¹⁴

¹¹⁰ Trainin AJIL 1946, p. 552.

¹¹¹ See below, p. 287.

¹¹² See below, pp. 107 ff.

¹¹³ Hazard 1953, p. 285.

¹¹⁴ For an English translation of the text, see AJIL 1933, Supplement pp. 192 ff. Hazard 1953, p. 286, comments this Convention as follows: "With the pact defining aggression Soviet diplomacy sought to bring to the defence of the U.S.S.R. international legal protection against not only the obvious forms of attack across land and sea and through the air. It indicated that there were other forms of activity which were equally perilous to its continued existence. The definition was drafted to forbid these more subtle forms of warfare as well as the military campaigns."

The purpose of the definition was stated in the Convention itself as being, among others, the fact that the signatory powers deemed it "useful, in the interest of universal peace, to put into force as between their countries, precise rules for the definition of aggression, pending the universal recognition of these rules". The definition itself ran as follows:

The aggressor in an international conflict, with due consideration to the agreements between the parties involved in the conflict, will be considered the state which will be the first to commit any of the following acts:

1. Declaration of war against another state;
2. Invasion by armed forces, even without a declaration of war, of the territory of another state;
3. An attack by armed land, naval or air forces, even without a declaration of war, upon the territory, naval vessels or air craft of another state;
4. Naval blockade of the coasts or ports of another state;
5. Aid to the armed bands formed on the territory of a state and invading the territory of another state; or refusal, despite demands on the part of the state subjected to attack, to take all possible measures on its own territory to deprive the said bands of any aid and protection.¹¹⁵

The paragraphs 1 to 3 of this definition embrace all the means of commencing war as they are under consideration in the state-of-war doctrine of the non-Communist States. Yet the Communist civil war doctrine becomes apparent in paragraph 5. According to the latter "invasion by armed bands" of the territory of a State is tantamount to an "international conflict", in which, however, the aggressor is not the bands, but the State who aided their formation on its territory or refused "to deprive the said bands of any aid and protection".¹¹⁶

The "Litvinov" definition of aggression developed the Communist civil war doctrine inasmuch as 'just war' was henceforth determined as a response to aggression. Although the original criterion for just war, i.e., class struggle, had not been abandoned, the juridical aspect of the Communist application of the just war principle was considered more in terms of aggression. The latter was branded as an international delict, in response to which war was held to be justified as a legitimate means of enforcing an international right.¹¹⁷

Soviet State practice, however, was not to remain consistent with the concept of war and the definition of aggression as had been proclaimed by Litvinov. In the Finnish-Russian war of 1939, the U.S.S.R. refused an invitation of the Council of the League for the

¹¹⁵ Cf. M. Bourquin: *Le problème de la sécurité internationale*. RdC. 1934/III, p. 508.

¹¹⁶ Cf. Hazard 1953, p. 286; see also Wehberg RdC 1951/I, p. 76. During the era of the League of Nations, the U.S.S.R. failed to introduce its definition of aggression as a general principle in international law.

¹¹⁷ Cf. Margolis 1951, p. 346.

settlement of the Russian invasion of Finland on November 30th, 1939. Despite the military operations going on between the two armies, the U.S.S.R. officially argued that she was not at war with Finland, nor did she threaten the Finnish nation with war.¹¹⁸ Hazard draws attention to cracks in the Soviet foreign policy position which had developed in the immediate pre-war years to assure protection in international law against aggressive members of the "capitalist" world. One of the first of these cracks was in the relatively unpublicized negotiation in 1945 of a charter under which the German war criminals were to be tried at Nuremberg. The negotiator for the United States, Mr. Justice Robert Jackson of the United States Supreme Court, has recounted the following incident. The representatives of France, the United Kingdom, the United States and the U.S.S.R. were meeting in London from June 26 to August 8, 1945. The Soviet delegation wished to limit the jurisdiction of the tribunal to the specific Axis situation. The Soviet proposal was to phrase the tribunal's jurisdiction in these words;

'The Tribunal shall have the power to try any person who has in any capacity whatever directed or participated in the preparation or conduct of any or all of the following acts, designs or attempts, namely: (1) Aggression against or domination over other nations carried out by the European Axis in violation of the principles of international law and treaties'.

The Soviet draft was objected to by the United States on the ground that it limited the declaration that any war of aggression was a crime by referring only to a war perpetrated by the Axis Powers. Mr. Justice Jackson reports that the United States stood ready to break up the conference without argument rather than accept a definition so conditioned, and ultimately the Soviet delegation yielded. The Soviet delegation later opposed any definition in the Nuremberg Charter of what was meant by "aggression", even though the United States delegation presented the very definition which the U.S.S.R. had incorporated in its treaty of 1933 defining aggression.¹¹⁹

Subsequently, another shift in policy became apparent when a definition of aggression was before a committee of the United Nations¹²⁰ in connection with the Korean war. The Soviet delegation was prepared to withdraw from the position the U.S.S.R. had taken against any definition of aggression in the Nuremberg Charter negotiation. Yet they wanted such a definition to be limited to the obvious types of military attack by the army of a State. They would accept no clause like that in their 1933 treaty defining aggression, which included as a

¹¹⁸ See below, pp. 197 ff.

¹¹⁹ The above reported facts are drawn on Hazard 1953, pp. 291/92.

¹²⁰ General Assembly, 5th Session, 1st Committee, 385th Meeting, November 6, 1950. With regard to this Session, Wehberg particularly stresses that the Soviet representative made the proposal to term 'aggressor' a State "dont les forces terrestres, navales ou aériennes auront été débarquées ou introduites dans les confins d'un autre Etat sans l'autorisation du Gouvernement de ce dernier, ou auront violé les conditions d'une pareille autorisation particulièrement en ce qui concerne la durée ou l'extension de la région de leur séjour." Wehberg RdC 1951/I, p. 76.

form of aggression the State support of armed bands invading the territory of another State. This new position of the Soviet policy towards the concept of war had its immediate repercussion in Soviet legal doctrine. An aggression in the sense of international law, it was affirmed, may occur only in relations between States. As a consequence, the use of force by one section of the population against another may never be qualified as an aggression; this would be only a civil war.¹²¹

Since the end of World War II both Communist and non-Communist States alike have tended to make use of the term 'aggression' more and more frequently. During and after the Korean War, those armed forces of the United States which participated in that conflict have been referred to by all Communist States as forces of aggression. Some of the Western States retorted by condemning the North Korean authorities as the 'aggressor'. Moreover, the Chinese People's Republic, whose armed forces aided the North Korean Government, was labelled an 'aggressor' by the United Nations General Assembly.

There is a general tendency in post-war Communist State practice to shift away from the legal meaning of the notion as has been ascribed to it by the Litvinov definition. Instead, the term 'aggression' is more and more employed for propaganda purposes as a means of moral condemnation of policies which run counter to Communist interests. In many of these cases the term aggression was even used in contradiction to its etymological meaning. Dr. Ho Chi Minh, the President of the People's Republic of Vietnam, on numerous occasions maintained that the war between his government and that of France was the direct consequence of an aggression launched by the latter.¹²² The military protection granted by the United States to the National Chinese troops on Formosa was qualified by all Communist States as 'aggression'.

All the controversies as to the legal meaning of aggression, however, digested for the needs of our study, clearly illustrate that the Communist conception of war is very much like that of 'material war'. Suffice it to say that Soviet State practice conformed itself to the distinction between civil war and inter-State war as it had been established in the 19th century. Yet, this does not preclude Soviet Russia from maintaining her specific civil war doctrine in legal theory.

*Paragraph 3. Communist and non-Communist States with regard to the war in Korea.*¹²³

The outbreak of the Korean conflict, when brought before the United Nations Security Council on June 25, 1950, obliged both Communist and non-Communist States to evaluate this armed contest in terms of international law.

¹²¹ V.N. Durdenevski and A.M. Ladyzhenskii: *Aggression and Intervention in the Far East in the Light of International Law*. Pravo No 2, February 1951, reported in AJIL 1951, p. 556.

¹²² Cf. Margolis 1951, p. 335.

¹²³ Cf. Marc Frankenstein: *L'organisation des Nations Unies devant le Conflit coréen*. 1952; Hazard 1953, pp. 294 ff.; L. De Vel: *United Nations Collective Action in Korea*, 1954, pp. 32 ff.

For the Communist bloc this task was easily performed. The Communist States merely retained their original notions of 'civil war', i.e., a war in the material sense which by definition is waged between the so-called proletarian and capitalist classes. To the Communists, the armed conflict in Korea, at least theoretically, bore these ideological features. From this point of view, it went without saying that the military hostilities in Korea constituted war in the specific Communist sense. The basic legal doctrine on this subject, as had been formulated by Korovin and others in the 1920's, has retained its authority ever since.¹²⁴

If, however, the U.S.S.R. availed herself of the 'bourgeois' notion of 'civil war' at the opening of hostilities, it was evidently for tactical reasons.¹²⁵ Soviet lawyers asserted immediately upon the entrance into Korea of troops carrying the United Nations flag that their presence was illegal under international law. In order to make such a claim, only the following two arguments can be given serious consideration:

In the first place, it could be argued that the war in Korea was a civil war and not a war between sovereign States, so that Art. 2 par. 7 of the United Nations Charter, which prohibits intervention in matters of domestic jurisdiction, could be called upon.

Secondly, it could be held that even if this were not so, the decision of the Security Council, having been taken without the presence of the U.S.S.R., was not legal under the Charter.

Soviet authors, however, availed themselves only of the first argument.¹²⁶ They merely declared that the conflict in Korea was a civil war. For obvious reasons, they have not faced the argument, as presented by the legal adviser to the Secretary-General of the United Nations, that the war was not a civil war because the United Nations General Assembly, in December 1948, had pronounced the government of the Republic of Korea to be "a lawful government... and... the only such Government in Korea",¹²⁷ having a *de facto* boundary on the 38th parallel, and the marching of troops across that boundary was an armed attack against a sovereign State. Any such controversy would lead Communist lawyers and statesmen necessarily to rely on the distinction between civil war (in the "bourgeois" sense) and international war (war between States).

To all intents and purposes, the Communists thought it handy to

¹²⁴ "If we turn to the war experience of Soviet Russia, we must observe above all that all of her wars from the standpoint of their ideological bases crystallized as a result the self-defence of the proletarian classes." (translation of the author). Korovin 1929, p. 120.

¹²⁵ The North Korean Government rejected the Security Council's decisions of June 25th and 27th, 1950, on the ground that they concerned a "civil war initiated by the clique of Syngman Rhee". The Soviet representative in the Security Council, Mr. Malik, denominated the Korean war as a 'civil war' in order to advocate the plea of domestic affairs.

¹²⁶ Cf. Durdenevsky and Ladyzhenskii in Hazard 1953, p. 295.

¹²⁷ United Nations, Doc. A/112.

call the Korean war a *war of independence* or *war of aggression*.¹²⁸ Before the Security Council, the U.S.S.R. expressly indicated that its position was that the United States was fighting an ordinary war of aggression in Korea.¹²⁹ Yet the United States was reminded by the U.S.S.R. that the United States was, of course, bound by the rules of war agreed to by it, as the invoked provisions (Art. 25 of the IV and Art. 1 of the IX Convention of the Hague) are in full force to-day and the armed forces of the United States are obliged to observe them.¹³⁰

Already on July 13, the Democratic People's Republic of Korea had sent formal word to the U.N. that its People's Army "is strictly abiding by principles of Geneva Convention in respect to Prisoners of War", to which it had adhered on July 6, 1950.¹³¹ Formally, the Communist bloc confirmed the guiding principles which Korovin had laid down in 1944 in a kind of field manual of war. In it the Red Army was told that the fact of the absence of a formal declaration of adherence to the Hague and other conventions before the Second World War must not be interpreted as the refusal of the Soviet Union to observe them. He said that the Soviet criticism of these conventions was not that they attempt to mitigate the horrors of war, but rather that they do it with insufficient consistency.¹³²

In the Western bloc, however, the question of whether or not the armed conflict in Korea was a war was taken up with considerable controversy. Though all of the participating States declared their readiness

¹²⁸ On June 28, 1950, Mr. Chou En-Lai, Minister for Foreign Affairs of the Chinese People's Republic, declared "The Chinese people... salute the peoples of Korea... who are carrying on their war of resistance against the American invasion". Cf. Margolis 1951, p. 335.

¹²⁹ Margolis 1951, p. 333, comments rightly this affirmation as follows: "If the Litvinoff definition is taken as the legal measuring rod for ascertaining when aggression has taken place,... the assertion that the North Korean authorities were the aggressor presupposes the acceptance of two controversial points, one of fact and the other of law — they are (1) that the North Korean actually crossed the frontier first and (2) that the North Korean and South Korean Governments actually represented two 'States' and not only two factions within the same State engaged."

¹³⁰ Security Council, Official Records 497th meeting, Sept. 7, 1950; see Taubenfeld AJIL 1951, p. 678. Cf. T. Komarnicki: *The Problem of Neutrality under the United Nations Charter*. Grotius Transactions 1953, pp. 89/90.

¹³¹ Cf. Croix-Rouge Internationale: *Le Comité de la Croix-Rouge et le Conflit de Corée*. 1952, p. 163.

¹³² E. Korovin: *Kratkii Kurs Mezhdunarodnogo Prava*. Chast II, Pravo Voyny, 1944; revued by Hazard in AJIL 1945, p. 618. This work of Korovin has been criticized by Soviet authors at a meeting of Members of the State and Law section. Cf. AJIL 1951, p. 348; Maurach, 1949, p. 743. At any rate, Soviet diplomacy has given in the Korean affair an affirmative answer to a topic raised by Korovin in 1946: "... can persons be considered guerrillas as defined by the Fourth Hague Convention, if, even though they meet the formal requirements of the Convention, they act voluntarily on the side of the aggressor or are accomplices in his crimes?" Korovin thought at that time that "the new legal aspect of war as a means of self-defense developing into international action against aggression places on a new plane all the problems of war and its so-called laws and customs". Korovin: *The Second World War and International Law*. AJIL 1946, p. 753.

to respect the Geneva Convention of 1949, there remained some disagreement as to the nature of the 'conflict' in Korea.¹³³ The arguments which denied the existence of a 'state of war' in Korea,¹³³ were based on the fact that the Korean military operations were conducted not by States acting independently but under the authority of the U.N. in pursuance of its Charter. Moreover, no declaration of war was ever made by the United Nations.

With a view to the lack of coherence among internationalists on the legal evaluation of the conflict in Korea,¹³⁴ the judicial pronouncements on this matter are of particular value. Time and time again resort was taken to the criterion of *de facto* war, which then proves to be tantamount to the concept of material war.

In the *Burns case*,¹³⁵ the Australian Foreign Office was called upon to pronounce itself on the question of whether Australia was at war with North Korea. The court was informed that

the Government has sent land, sea and air forces to Korea to assist in taking military measures in order to restore international peace and security in Korea as provided in Chapter VII of the Charter of the United Nations. The Australian forces are engaged in active

¹³³ There was full recognition among the parties to the conflict that "unavoidable mutuality of obligations could not be set aside by a terminological device. Although no declaration of war was issued, neither side challenged the applicability of rules of warfare." H. Lauterpacht: *The Limits of the Operation of the Law of War*. BYB 1953, pp. 206 ff. at p. 223.

On June 11, 1952, the British Secretary of State for Foreign Affairs in an answer to the question whether a state of war existed at that time between the United Kingdom and the Republic of North Korea declared that "we are not engaged in a war with the Republic of North Korea because we do not admit that there is such a State (House of Commons Deb., vol. 502, col. 202 quoted from Lauterpacht BYB, 1953, p. 2222)." The United Kingdom forces in Korea were said to be engaged "in action under the United Nations for the resistance of aggression."

¹³⁴ Sauer 1952, p. 287: "Kein formeller Krieg war die Vollstreckung der UNO Beschlüsse durch die UNO-Truppen gegen Nordkorea 1950; der Krieg begann erst, als Rotchinesen und Sowjet-Russen die Nordkoreaner unterstützten. Tatsächlich (soziologisch-historisch) bestand jedoch ein Krieg schon vorher, der unverbildete Mann betrachtete jenen Kampf als einen Krieg zwischen USA und Russland, und so wuchs er sich bald auch juristisch aus." Jessup, *Acta Scandinavica* 1953, p. 24: "I cannot discuss in detail the question whether there is now 'war' in Korea and, if so, who are the parties to the war. I merely note in passing that it does not seem to be maintained that the United States or the United Nations is at war with the Soviet Union in Korea although Soviet responsibility for the aggression is apparent."

¹³⁵ Quoted from L.C. Green: *The nature of the 'war' in Korea*. ILQ, 1951, p. 462: An Australian Communist newspaper, *The Tribune*, had published in 1950 a seditious article against the Australian participation in the war of Korea. The article that was most strongly objected to appeared on July 12, 1950, and was occasioned by the seamen's strike of that month. Under headlines reading 'Seamen's Patriotic Lead — Stop War in Korea' the newspaper declared "not a man, not a ship, not a plane, not a gun for war on Colonial liberation movements in Asia." In August a Summary Court sentenced W.F. Burns, the newspaper's publisher, to nine months for sedition, and his appeal against this verdict came before Judge Berne in Sydney. A new judge instructed to hear the appeal dismissed it on April 6, 1951.

hostilities and have suffered intensive casualties. That Australia is at *war de facto* is clear. Whether or not Australia is at *war de jure* depends on the interpretation of the Charter as applied in the circumstances.¹³⁶

The statement of Australian government can be considered as expressing the general viewpoint which the States of the UN forces took with regard to the Korean war. The terminology of *de facto* and *de jure* war, however, was not conceived in the sense that the former was bare of legal implications. Instead, it was understood that only those laws which deal with *de facto* war were necessarily to be applied while the laws dealing with formal war could not be applied unless an interpretation of the Charter to the opposite effect was justified by the particular circumstances.¹³⁷ Accordingly Judge Latimer made the following statement in *U.S.v.Bancroft*:

We believe a finding that this is a time of war, within the language of the Code, is compelled by *the very nature*¹³⁸ of the present conflict. ...For our purpose, it matters not whether the authorization for the military activities in Korea springs from Congressional declarations, United Nations Agreements or is ordered by the Chief Executive... The President, as Commander-in-Chief, ordered members of the armed services into the conflict, he involved this country in hostilities to such an extent that a state of war existed; and that Congress when it used the phrase 'in time of war' in the military Code, intended the phrase to apply to that state regardless of whether it was initiated or continued with or without a formal declaration.¹³⁹

¹³⁶ Green *ibid.* concludes from this statement that "in practice the Commonwealth of Australia regards itself as at war with an unrecognized entity known as 'The People's Republic of Korea'. That in being so, even Judge Berne agreed that the article in the Tribune was seditious."

¹³⁷ In *Marcus Clark Co. V. Commonwealth* the question at stake was whether or not a formal state of war had been created as a consequence of the participation in the UN enforcement measures in Korea. It was held that, notwithstanding the hostilities in Korea, there existed an ostensible state of peace, the condition, in 1951, of 'severe international tension' was a material factor in upholding the applicability of the Defence Preparations Act of 1951. Australian Law Journal, 26 (1952) p. 321; quoted from Lauterpacht BYB 1953, p. 222.

¹³⁸ Italics added.

¹³⁹ *U.S. Ct. Mil. App. 3, 11 C.M.R. 3* (July 3, 1953) reported in AJIL 1954, pp. 157 ff. The legal question was whether or not a special court-martial lacked jurisdiction to try a Navy enlisted man for sleeping on his post in Korea, since such a court could not try any capital offense and the death punishment was not possible for sleeping on post, except in 'time of war'. To the same effect *U.S.v. Gaun et Al.* (1953), 3 U.S.M.C.A. 12, 11 C.M.R. 12; see Lauterpacht BYB 1953, p. 221.

It was stated by Sir Hartley Shawcross, the Attorney-General, in the British House of Commons on 20 November 1950 that the law of treason "is applicable to such a conflict as it is to an ordinary war between State and State" (House of Commons Deb., vol. 481, col. 13; quoted from Lauterpacht BYB 1953, p. 222, n. 1). Lauterpacht BYB 1953, p. 222, concludes from these facts that "it was recognized that for some purposes, as for instance with reference to the law of treason, the hostilities, though not

Did the conflict in Korea constitute a 'war' within the meaning of an insurance policy? This had to be decided upon in '*Weissman v. Metropolitan Life Ins. Co.*' The U.S. District Court which was seized with the matter, commented abundantly on the insufficiency of the state-of-war doctrine in our times. It gave the following pertinent statement:

The noun 'war' is one of those words in the English language which though everyone understands its meaning, few can definitely define it. It is probable that when the contract in question was executed there was no discussion between the parties as to the meaning of the term 'country at war'. ...

From the authorities cited above we must come to the conclusion that there may be war (within the meaning of that term employed in an insurance policy) without an official declaration thereof and that unless it is indicated in the contract that the term 'war' is to be used in its strict, legal sense the parties have a right to assume it is to be given its common understanding or meaning.¹⁴⁰

It would appear from this comparison between the Communist and non-Communist blocs that from the standpoint of contemporary inter-

described as war in the technical sense of the term, could properly be treated as if they constituted war. Under Municipal law this may also be the position with regard to such questions as the treatment of the nationals of the aggressor State as alien enemies; prohibition of trading with the enemy... effect upon treaties, and jurisdiction of prize courts — although in all these cases the enactment of special legislation assimilating the hostilities to war is probably the preferable course."

¹⁴⁰ 112 F. Supp. 420 U.S. Dist. Ct. Calif., May 20, 1953, reported in AJIL 1954, p. 155: Denying double indemnity because the insured was killed on August 31, 1951, while a soldier in the U.S. Army in combat in Korea, the court held that the United States was 'at war' in Korea within the meaning of a clause in the insurance policy which had been issued in 1943. To an opposite effect the decision of the Supreme Court of Texas in *Western Reserve Life Insurance Co. v. Meadows*, Court of Civil Appeals, 256 South Western National Reporter (2d) 674 October 7, 1953, reported in AJIL 1953, p. 719: The Court refused to hold that the hostilities in Korea amounted to war in the meaning of an insurance policy which exempted from the double indemnity clause cases in which the insured was in military service in time of war at the date of the accident. See to the same effect *Beley v. Pennsylvania Mutual Life Insurance Co.* (1953) 373 Pa. 231, 95 A. 2d 202 and *Harding v. Pennsylvania Mutual Life Ins.* (1953) Pa. 270, 95 A. 2d 221. In *Gagliormella v. Metropolitan Life Ins. Co.*, F. Supp. 246 (D. Mass., June 25, 1954) the United States under Massachusetts law, was held to be a "country at war" during hostilities in Korea, and a death in action in Korea in 1952 was held to have been the result of 'an act of war' within the meaning of double indemnity clauses in life insurance policies. Reported in AJIL 1955, p. 103.

The Supreme American Federal Court refused in the cases of *Pennsylvania* and *Texas* any possibility of repeal. Cf. M. Domke: *Deutsche Völkerrechtsfragen vor amerikanischen Gerichten* 1953. ArchivVR 1955, p. 91, n. 20 a who gives numerous references to American comments on these cases. Divergent decisions in relation to charterparties have been given in commercial arbitrations on the question whether the Korean conflict was 'war'. For an affirmative reply to this question; *The Katrine Maersk* (1951), A.M.C. 324 and *The Simon Rensor*, *ibid.* 585. But see *The Yankee Fighter*, *ibid.* 579 quoted from Lauterpacht, BYB 1953, p. 221.

national law, a war was being fought in Korea. This legal fact is confirmed by the majority of municipal decisions inasmuch as questions about material war had been involved. The Korean war was a war in the material sense; whether it was also a war in the formal sense depends on one's interpretation of the Charter of the United Nations as applied in the circumstances.¹⁴¹ The Korean war is one more strong authority to show that, under international law in general and in the relationships between the Communist and non-Communist States in particular, war exists when the material characteristics of war are present.

The principles of the laws of war are in their essence independent of the formal status of the parties to the struggle. The same considerations for humanity, the same fear of reprisals, and the same desire to avoid involvement exist, whether it be a civil war or an international war.¹⁴²

Although in many instances it proved possible during the hostilities in Korea to avoid the designation of these hostilities as war, both in international and municipal law the "collective action of States on behalf of the United Nations with the object of restoring peace" was recognized as war wherever the law dealing with material war was under consideration.

¹⁴¹ In the *Australian Communist Party v. Commonwealth of Australia* (1951) 83 C.L.R. 1, the Court held that in October 1950, at a time when Australia was participating in the hostilities in Korea, an ostensible state of peace existed. In the words of Dixon J.: "Australian forces were involved in the hostilities in Korea, but the country was not of course on a war footing" (at p. 196). McTiernan J. held that at the material time the Commonwealth was not engaged in any hostilities except in Korea but that the prevailing state of affairs was peace, not war. Latham C.J. who held, in a dissenting judgment, that neither the existence of war in the technical sense nor actual fighting were a condition of the exercise of defensive power, pointed to the necessity of a reconsideration of the maxim *ubi bellum non est, pax est*. Reported in Green ILQ 1951, p. 466.

The difficulties in considering the Korean war as a war in the formal sense were illustrated in a discussion at Panmunjom between the Communists and the representatives of the United Nations. There was a bitter exchange concerning the neutrality of the Soviet Union in the Korean war. "Is your side now in a state of war with the Soviet Union?" asked the North Korean delegate Ki Sok Bok. "If not, how can your side deny that the Soviet Union is a neutral nation apart from the two belligerents?" Reported in P. Jessup: *Should International Law Recognize an Intermediate Status between Peace and War?* AJIL 1954, pp. 98/99.

¹⁴² Ti-Chiang Chen: *The International Law of Recognition*. 1951, p. 356. In particular, both sides formally declared in the course of the Korean conflict their determination to abide by the provisions of the Geneva Convention relating to prisoners of war. "The customs of war, followed by most or all nations usually for long periods, have become in a manner of speaking a 'custom of the trade' of armed conflict and U.N. forces must be restrained and limited by such rules." Taubenfeld: *International Armed Forces and the Rules of War*. AJIL 1951, p. 676.

Paragraph 4. Conclusion.

Like all other law under Communist consideration, international law, whether reflected in treaties between States or in the recognition of international customary rules, has theoretically retained its class character. Support of international law by the Communist bloc is explained for the time being on the grounds that this serves to mitigate the violence of the class struggle and permits the development of international law in conformity with Communist interests.

The theory of the Communist States with regard to war is drawn up in terms which have but little in common with the classical state-of-war doctrine. The Communist conception of war, therefore, needs interpretation in terms which will make sense within the scope of the legal thinking about war in the non-Communist States. With this in mind, one can sum up the doctrinal features of the Communist concept of war as follows:

(1) The Communist legal concept of war takes its shape from the political doctrine of class-struggle and is revealed in the Marxist civil war doctrine.

(2) Civil war in the non-Communist sense and Communist civil war are not synonymous. Communist civil war is a war in the material sense which, however, has the particular feature that it is waged between two classes, the proletariat and the capitalists or imperialists. Communist civil war, according to its doctrine, is conceived to be *per se* of international concern because of its function to bring about the reign of Communism all over the world.

As a consequence, the 'bourgeois' distinction between wars waged between States (constituting a state of war between them) and wars occurring within a State as a result of internal insurrection (civil war) is irrelevant in Communist legal thinking.

(3) Communist civil war is a just war on the part of the proletariat, which is evidenced in practice by the criterion of aggression. Communist civil war, by its very nature, is incapable of being aggressive war.

In practice, however, Soviet foreign policy has had under consideration the concept of war in the material sense. Since the end of World War II Communist States, for tactical reasons or reasons of expediency, have resorted to the distinction between civil war (in the classical sense) and war waged between States without abandoning their peculiar doctrinal concept of Communist civil war.

CHAPTER IV

ON THE RELATIONSHIP BETWEEN *JUS AD BELLUM* AND *JUS IN BELLO* IN DOCTRINE AND STATE PRACTICE

It has been increasingly voiced in modern legal thought that war is no longer a living concept in the practice of international law. This argument is particularly due to the unconsciousness of the specific evolution in the relationship between the *jus ad bellum* and the *jus in bello*. It can fairly be said that in both the Middle Ages and the classic period of *jus publicum europaeum*, the underlying concepts of war in the *jus ad bellum* and the *jus in bello* were identical. By the end of World War I, however, a marked tendency appeared in the doctrine of *jus ad bellum* which purported to transform the latter into a *jus contra bellum*. This transformation which, as far as it is possible, has legally been achieved under the Charter of the United Nations, entails a very important change in the relationship between the former *jus ad bellum* and the *jus in bello*: the identity of the concept of war, which was common to both of these categories of the laws of war, discontinued when the *jus ad bellum* evolved into a *jus contra bellum*. In our day, the recognition of a *jus contra bellum* is tantamount to the transposition of the concept of war from the province of general international law to that of international penal law. It goes without saying that in the *jus contra bellum* the underlying concept of war was shaped according to the needs of penal law, which is to a very large extent preventive law.

Moreover, any further investigation into the concept of war in the formal and material senses would be 'highfalutin humbug' if the contention were right that the outlawry of war, i.e., the *jus contra bellum*, had abrogated the *jus in bello*. Suffice it to say that the *raison d'être* of the concept of war in the formal and material senses is precisely the regulation of the *jus in bello's* selective application.

It is the intention in the following to prove by a very close examination that (1) in the evolution of the contemporary *jus contra bellum* the underlying concept of war belongs to international penal law and is different from that of the *jus in bello* which belongs to general international law; (2) the *jus in bello* has retained its binding force and has neither been abrogated by the principle of military necessity, by the argument of *ex injuria jus non oritur*, nor by the proclamation of total war.

SECTION 1. THE DIFFERENCE BETWEEN "JUS AD BELLUM" AND "JUS IN BELLO".

Of the body of international laws which treat of war or relate to it, there are two groups.¹ The first deals with the recourse to war and forms the *jus ad bellum*. Generally, the rules of this group refer specifically to the term *war*, such as the Third Convention of the Hague relative to the opening of hostilities, Articles 11-16 of the Covenant prohibiting any immediate resort to war, or the outlawing of war in the Briand-Kellogg Pact. Moreover, all the rules which consider eventual recourse to war as an instrument of sanction by the international community, form part of this group. One of the characteristics of all these rules is that they apply extensively in time of peace and have therefore come to form a part of the law of peace. Some of them function as rules of procedure.²

The second group is comprised of all the rules for which the outbreak of war is the condition *sine qua non*.³ In other words, these rules come into force only when hostilities are in progress. The entire group forms the *jus in bello* which regulates the belligerency of the two contending parties.⁴ A large part of the *jus in bello* has developed from military usages into customary international law.⁵

¹ Cf. Ballis 1937, p. 2, who describes the *jus ad bellum* as "the law into war", as it comprises the law relating to commencing war. The *jus in bello* as the "law in war" is said to cover the law concerning the conduct of war.

² Cf. Heinrich Hilleke: *Der Kriegsbegriff und seine Stellung in der Weltordnung*. 1932, p. 49, who maintains that all law relating to war is by its very nature a law of procedure.

³ This condition is termed by the school of Bordeaux a "fait-condition". Positive law, according to this school, considers war as a "fait-condition", i.e., a factual condition for the coming into force of all laws pertaining to the *jus in bello*. While subscribing to this theory, it would, however, be better not to employ the term "fait-condition" in the sense of the said school, considering that Kelsen, in his pure theory of law, has already assigned to the same term a precise function. (In Kelsen's theory, the term "fait-condition" is understood only in its connection with "fait-conséquence", which together form the internal structure of any legal rule.) Cf. Ch. Rousseau: *Droit international public*. 1953, p. 538.

⁴ J. Westlake: *Collected Papers*. 1914, pp. 237 ff. held that the rules that control hostilities are the worst and weakest part of international law but that it is by this worst and weakest part that international law has always been popularly judged and discredited. Cf. also Guggenheim Lehrbuch II, p. 778; J. Kunz: *Kriegsrecht und Neutralitätsrecht*, 1935, p. 2; A. de La Pradelle: *La reconstruction de droit de la guerre*. 1936, pp. 83 ff. at p. 87; S.H. Brown: *Les lois de la guerre selon la doctrine du droit international depuis 1919*. Rev. I. Croix-Rouge 1934, pp. 367 ff.; Mosler: *Die Kriegshandlung im rechtswidrigen Krieg*. JahrbuchiaöR 1948, pp. 339 ff.; S. Glaser: *Introduction à l'étude Droit International Penal* 1954, p. 22. There are a great many laws which are only *laws of competence*, i.e., they authorize the belligerents to regulate certain branches at their own discretion. Cf. Kunz 1935, p. 21.

⁵ Kunz 1935, p. 21: "Das Kriegsgewohnheitsrecht gilt für alle Staaten der Völkerrechtsgemeinschaft, soweit nicht für einzelne Staaten besondere vertragliche Normen in Geltung sind."

The laws concerning the status of neutrality are sometimes ascribed by legal theories of international law to the *jus in bello*. The law of neutrality, however, has not originated and evolved side by side with war and the law of war proper.⁶ As the legal status of neutrality has developed only in fairly recent times, and as the concept of neutrality is not an absolute corollary to war,⁷ one might better separate the laws of neutrality from the *jus in bello* and assign it a function of its own in the laws of war.

In its historical developments the *jus in bello* has mostly been dependent upon the *jus ad bellum*. At the present time, however, the application of *jus in bello* depends only on the actual commencement of war, whether it be legal or illegal.⁸ In the course of the 19th and 20th centuries a great deal of both the *jus ad bellum* and the *jus in bello* have undergone a change from customary law to conventional law.⁹ Yet in none of the respective conventions agreed upon ever since, could there be found any authentic definition of war. None of them tells us what war is, because all of them presume the concept of war to be settled.¹⁰ The definitions of war given by international lawyers in textbooks and general treaties of international law are lacking in common agreement. The concept of war in international law is to be derived in the first place from the application of the *jus in bello* by State practice in modern times. While the classical *jus ad bellum* relied essentially on the notion of war as had been developed by the state-of-war doctrine, the contemporary *jus contra bellum* has been rested on a new 'prophylactic' concept of war which must be confined to the province of international penal law. The present study is only concerned with an investigation into the modern concept of war under general international law.

⁶ Castrén 1954, p. 426.

⁷ See below, pp. 128 ff. Castrén 1954, p. 424, observes that the law of neutrality "is a body of law brought into being by war, and in this sense it may be included in the law of war in a broad sense."

⁸ Cf. P. Guggenheim: *Traité de droit international public*. Tome II, 1954, p. 304.

⁹ Cf. T.E. Holland: *Letters to The Times upon War and Neutrality*, 1916, pp. 22 ff. "Das Kriegsvertragsrecht ist zum Teil bloss Kodifikation des geltenden völkerrechtlichen *Gewohnheitsrechts*. Daraus folgt, dass der *Inhalt* dieser Verträge auch für Staaten, welche sie nicht ratifiziert haben, oder in Fällen, in denen diese Verträge als Verträge nicht bindend sind, *positives* Kriebsrecht sein kann, nicht als Vertrags-, aber als *Gewohnheitsrecht*." Kunz 1935, p. 21.

¹⁰ Kuei 1945, p. 13: "In keinem dieser Dokumente wird erklärt, was unter Krieg zu verstehen sei, sondern alle setzen den Kriegsbegriff als feststehend voraus."

SECTION 2. ON THE DEVELOPMENT OF THE "JUS AD BELLUM"
TOWARDS A 'JUS CONTRA BELLUM'.

Paragraph 1. "Jus ad bellum" finds its origin in the theory of the "bellum justum".¹¹

The law of war constitutes the oldest part of the *jus gentium*. Until the beginning of the 20th century it represented the greatest part of international law. The evolution of the law of war in the Middle Ages, as has been shown above, went hand in hand with the development of the doctrine of the *bellum justum*. According to this doctrine, the application of that set of rules which is now called *jus in bello* was not conceived to be independent from the principles of *bellum justum*. The latter constituted, in modern terminology, the *jus ad bellum* of the Middle Ages. Accordingly, the *jus ad bellum* of that time was, on the one hand, formed and developed by the doctrine of *bellum justum* which, on the other hand, gave rise to the application of the *jus in bello*. In addition, the application of the *jus in bello* was also regulated by the principle called 'the distinction between peoples with respect to war'.¹² This distinction meant that in certain wars the application of the *jus in bello* was not compulsory, as, for instance, during the Middle Ages in wars waged against the unbelievers and against heresy.

The soundness of this practice, however, was very early made the critical concern of theologians and jurists. They reexamined its legitimacy during the era of crusades to Palestine. The subject was taken up again at the beginning of the 15th century when wars were pitilessly waged by Spain and Portugal against the inhabitants of the New World. The remaining questions at stake were whether or not a war waged against the unfaithful, by its very nature (1) is a just war; (2) entitles a power to dispense with the *jus in bello*. In the realm of theory, these questions were never authoritatively decided upon. Yet in practice, wars against the unbelievers were commonly held to permit of dispensing with the *jus in bello*.¹³

With the formalization of the *bellum justum* theory, which made it a theory of the right enemy (*justus hostis*), the distinction between *jus ad bellum* and *jus in bello* became more discernable. Still, its interdependence remained unaffected.

The formalization of the idea of just war was carried by Grotius to such a degree that the interpretation of his ideas with regard to just war has become controversial. The question has been raised ever since as to whether or not Grotius can be said to retain the original ideas

¹¹ See above, p. 30. Cf. J.L. Brierly: *The Outlook for International Law*. 1945, pp. 19 ff.

¹² Ballis 1937, pp. 34, 72, 75, 79.

¹³ Cf. Nys 1894, p. 140.

about just war.¹⁴ As a matter of fact, Grotius drew a distinction between *jus naturale* and *jus gentium*. While the former is compulsory for all peoples according to the will of God, the latter, being a *jus voluntarium*, is based on the consensus between States. Grotius evidently attributed the classical content of the *bellum justum* theory to the realm of *jus naturale*. As to *jus gentium*, war must be begun only in the 'right' forms, i.e., it is to be initiated by a sovereign prince.¹⁵

Paragraph 2. The era of the "*jus belli ac pacis*"
or "*jus publicum europaeum*".

In the field of *jus gentium* the decline of the Middle Ages is marked by the end of the "*una res publica Christiana*". The transition period towards the new era of the "*jus publicum europaeum*", which started out by the middle of the 17th century, was full of arbitrariness as far as the respect of the rules of war was concerned. In the 16th century almost everything seemed to be permitted against the enemy and hardly any attempt was made to distinguish the degree in which the combatants and non-combatants partake of a hostile character.¹⁶

The opening of the *jus publicum europaeum* was marked by the rise of nationalism. As a consequence, the former became more and more a special order of "inter-national law" which had replaced the classical *jus gentium*.¹⁷ As to war, it was recognized that the sovereign of a

¹⁴ Historically, the concept of just war was not based upon the positive law alone but included elements of natural and moral law as well. Cf. R.W. Tucker: *The Interpretation of War under present International Law*, ILQ 1951, p. 14. It has even been maintained that the doctrine of *bellum justum* in its pure form is wholly an ethical one. J. Kunz: *Bellum justum and Bellum legale*. AJIL 1951, p. 530. To an opposite effect, Elbe AJIL 1939, pp. 665 ff.

¹⁵ Bourquin 1948, p. 92: "A la distinction entre les guerres justes et les guerres injustes, Grotius superpose, en effet, une autre distinction — toute différente — entre les guerres régulières et celles qui ne le sont pas.

La régularité de la guerre, telle qu'il la comprend, est complètement indépendante de sa cause. Les conditions qu'elle exige ne sont plus des conditions de fond. Ce sont simplement des conditions de compétence et de forme. La guerre est régulière, dit-il, quand elle a lieu entre peuples différents, qu'elle est soutenue par le pouvoir souverain et qu'elle a fait l'objet d'une déclaration préalable... Rien de commun, par conséquent, entre cette distinction et celle du *bellum justum*. Nous sommes sur un tout autre terrain."

Attempts by writers in the 16th and 17th century to list and define the 'just' causes of war failed, partially through lack of adequate criteria, to affect the conduct of States, and in practice the causes of war came to be regarded as beyond the province of international law. Cf. Tucker *ibid.*; Kunz AJIL 1951, pp. 530/31.

¹⁶ Cf. Westlake, *Collected Papers*, 1914, pp. 240/41.

¹⁷ Bourquin 1948, p. 84: "Le système du *jus gentium* ne correspondait plus aux faits. Par la force des choses, il devait s'effacer devant un système différent, basé sur l'indépendance et la souveraineté des Etats. Ce qui allait devenir la conception classique du droit des gens se trouvait logiquement impliqué dans les conjonctures nouvelles."

State disposed of the right to wage war, the so-called *jus belli ac pacis*.¹⁸ Consequently, the laws of war were characterized by the two dominating features:

(1) The doctrine of *bellum justum* is no longer a legal theory for the regulation of resort to war. Certainly, attempts to distinguish between just and unjust causes of war remained extremely important, but they belonged hitherto to morality and theology.¹⁹ Only so far as the legal notion of war was described by States as "defense of a legal right" can it be said that the distinction between just and unjust war did not become entirely extinct.²⁰

(2) Only the sovereigns of States are invested with the right to wage war, which is a discretionary power. The notion of war itself became, by way of legal fiction, identified with the idea of armed contest between States. Any armed conflict waged between political entities other than States is denied the character of war in the realm of international law.

The necessary outcome of the *jus belli ac pacis* was that the legal question of guilt with regard to the outbreak of war became completely immaterial.²¹ As Vattel observed, the war, if it is waged in the 'right form' (*guerre en forme*) must be regarded as just on both sides.²² This

¹⁸ It can be said that this *jus ad bellum* was regarded as one of the characteristics of sovereign States. Cf. S. Brown: *Application, en cas d'hostilités non accompagnées d'une déclaration de guerre, des Conventions de Genève et de la Convention relative au traitement des prisonniers de guerre*. Rev. I. Croix-Rouge 1934, p. 458.

¹⁹ Cf. J.T. Lawrence: *The Principles of International Law*. 7th ed. 1923, p. 311. G. Scelle: *Manuel de droit international public*. 1948, p. 846, holds the following view: "C'est en vain, qu'on a prétendu que la notion de juste guerre s'est perpétuée dans le Droit classique. Ce ne peut être, en tout cas, qu'une survivance morale, dès lors que chaque gouvernement souverain est seul juge de ce qui est Droit et non Droit et de l'opportunité de le sanctionner. La distinction entre guerre offensive et guerre défensive est, en Droit international classique, sans pertinence juridique." See also A.D. McNair: *Collective Security*. BYB 1936, pp. 150/51.

²⁰ The following explanation was given by J.J. Moser in the middle of the 18th century:

"Fragt man nun: Ob es auch möglich seye, zu bestimmen: Was für Ursachen nach dem Völker-Recht zu einem Krieg hinlänglich seyen? so muss man notwendig mit nein antworten, weil meistens darüber gestritten wird, welches die wahre Ursachen seyen, warum man die Waffen ergriffen habe, weil der Gegentheil die angegebene Ursachen nie für gerecht und hinlänglich erkennt, und weil kein Richter ist, der entscheiden kann." *Europäisches Völkerrecht in Kriegszeiten*. 1752, p. 87.

Cf. Wehberg RdC 1951/I, pp. 25 ff. who gives a compilation of contemporary writers subscribing to the fact that the *jus publicum europaeum* did not prohibit the recourse to war. See also Oppenheim-Lauterpacht IntL 1952, p. 178.

²¹ Cf. Kunz 1935, p. 36 and AJIL 1951, pp. 528/29. McNair BYB 1936, p. 152, employed the term 'extra-legal' war, which ever since has been accepted by many writers. Cf. Tucker ILQ 1951, p. 13.

²² Vattel: *Le Droit des Gens*. 1758, Liber III, Chap. XII, par. 190.

so-called 'indifference theory' reached its peak in the 19th century.²³ From the fact that the legality of war had become immaterial, it was then derived that any attempt to establish a collective sanction for non-execution of arbitrary decisions was necessarily bound to fail.²⁴

The positive laws of the *jus ad bellum*, however, which had governed the relationship of the ruling princes under the *una res publica Christiana*, became deteriorated only in substance but not in form. In its final shape, the *jus ad bellum* of the *jus publicum europaeum* became identical with certain principles relative to the opening of hostilities.²⁵ Here the question arose as to whether or not the opening of a war must be communicated to the enemy in one form or another. The topic was finally settled by the Third Hague Convention relative to the opening of hostilities. This codification of the *jus ad bellum* of the 19th century presumed a concept of war which is to be retraced only by an analysis of the whole context of that convention.

Another impact of the *jus belli ac pacis* consisted in a definite abolition of any interdependence which had so long existed between the *jus ad bellum* and *jus in bello*.²⁶ On the one hand, since the 16th century, limitation after limitation has been imposed on the modes of conducting war. On the other, the *jus ad bellum* did not any longer determine the application of the *jus in bello*: the application of the *jus in bello* became compulsory, regardless of whether or not war had been opened in due form. All that mattered for the application of the rules of warfare was that the contending States in an armed conflict agreed to call it 'war'.

The end of the *jus publicum europaeum* coincided with the end of the

²³ Mr. Seward declared to the Marquis de Montholon (Washington) on December 6, 1865: "Nous reconnaissons à toute nation souveraine le droit de faire la guerre à une autre, pourvu que cela n'empiète pas sur nos droits, ou ne menace pas notre sécurité ou notre juste influence." *Fontes*, No. 2421.

While resort to armed force among the great powers could only be justified by their *jus ad bellum*, resort to armed force by a great power against a small power could in addition be justified on grounds of intervention. M. Drouyn de Lhuys gave in this respect the following reasoning with regard to the French expedition in Mexico: « Nous sommes donc allés au Mexique pour y exercer le droit d'un principe d'intervention sur lequel nous professons la même doctrine que les Etats-Unis. Nous sommes allés... pour obtenir les réparations et les garanties que nous avons dû réclamer...

En résumé... les Etats-Unis reconnaissent le droit que nous avons de faire la guerre au Mexique; d'autre part, nous admettons, comme eux le principe de la non-intervention." M. Drouyn de Lhuys to Marquis de Montholon, January 9, 1866. *Fontes* No. 2422.

²⁴ Cf. P. Guggenheim: *La sécurité collective et le problème de la neutralité*. SJIR 1945, p. 13.

²⁵ M. Merle: *Le procès de Nuremberg et le châtement des criminels de guerre*, 1949, pp. 14 ff. rightly declared with regard to the war guilt of the German Emperor William II: "Il paraît que Guillaume II était alors inaccusable pour avoir violé le *jus ad bellum*, vu que celui-ci s'épuisait alors dans la réglementation de l'ouverture des hostilités." See also Scelle 1948, p. 853.

²⁶ Bluntschli: *Das moderne Kriegsrecht der zivilisierten Staaten*, 1874, p. 519, points out that it is just because of the abolition of that interdependence that the general application of the laws of war could be secured.

First World War. The Covenant of the League of Nations abrogated the *jus belli ac pacis* in its pure and traditional form. Yet, the League of Nations was heir to the independence which both the *jus ad bellum* and the *jus in bello* had acquired in international law. She was to fail in her efforts to reestablish an interrelationship between the *jus ad bellum* and the *jus in bello*.

*Paragraph 3. The relevance in international law of the Third Hague Convention of October 18, 1907 relative to the opening of hostilities.*²⁷

Codification of the law relative to the opening of hostilities which are intended to initiate a state of war, must be considered in its dual aspect:

(1) For the High Contracting Parties of the Convention, "considering that it is important, in order to ensure the maintenance of pacific relations, that hostilities should not commence without previous warning", it necessarily brings about an order of regional international law. In this quality the Third Hague Convention of 1907 obliged the contracting parties not to begin their bellicose settlement of claims contrary to the laws agreed upon. It is in this sense that in our times the indictment of the major German war criminals before the Military Tribunal at Nuremberg incorporated this Convention in the Treaties violated by Germany.²⁸

(2) Any such Convention may or may not affect general international law. In this regard, the Convention proved to constitute no more than an authoritative confirmation of the state-of-war doctrine which has been based on the following axioms: *a*) war being a state; *b*) war being characterized by the *animus belligerendi*; *c*) war being a contest between States; *d*) war being definable by one legal definition.²⁹

²⁷ E.C. Stowell: *Convention relative to the Opening of Hostilities*. AJIL 1908, pp. 50 ff.; M.O. Hudson: *The Duration of War Between the United States and Germany*. Harvard Law Review 1926, pp. 1020 ff.; Clyde Eagleton: *The Form and Function of a Declaration of War*. AJIL 1938, pp. 19 ff.; G. Wilson: *War Declared and the Use of Force*. AS Proceedings, 1938, pp. 109 ff.; Guggenheim, *Traité II*, p. 351.

²⁸ Cf. Oppenheim-Lauterpacht *IntL*. 1952, p. 293; Holland 1916, p. 34; Eagleton, *ibid.*, p. 35. The situation has, of course, altered greatly since the Hague Convention was adopted. It goes without saying that the provisions as laid down in 1907 in the matter of ultimatum and the necessity for a declaration of war must be read at the present time in the light both of the subsequent basic instruments relating to the limitation and the prohibition of the right of war. With regard to the members of the United Nations Oppenheim-Lauterpacht raises the question, how can they properly be in a position to comply with the obligation to issue an ultimatum prior to resorting to war, if it is unlawful for them to threaten another State with the use of force (1952, p. 297)? The answer is that the Third Hague Convention of 1907 has become irrelevant for the members of the United Nations so long as the Charter remains effective.

²⁹ No answer, however, was given to Col. Ting, the Chinese delegate at the Second Hague Conference, who asked whether a declaration of war can be considered by the State toward which it is directed as a unilateral act, and whether the latter can regard it as null and void. He observed

I. *The Third Hague Convention with regard to the contracting parties.*

The High Contracting Parties agreed that:

“Article 1. The contracting Powers recognize that hostilities between themselves must not commence without previous and explicit warning, in the form either of a reasoned declaration of war or of an ultimatum with conditional declaration of war.

“Article 2. The existence of a state of war must be notified to the neutral Powers without delay, and shall not take effect with regard to them until after the receipt of a notification, which may, however, be given by telegraph.

Neutral Powers, nevertheless, cannot rely on the absence of a notification if it is clearly established that they were in fact aware of the existence of a state of war.”³⁰

The only two conditions, according to the provisions in Article 1, which declarations of war must fulfill, are that they must be clear and that they must state the reason for recourse to arms. No delay between the declaration and the actual commencement of hostilities is stipulated and it is, therefore, possible for a Power to begin hostilities immediately after having presented a communication of the declaration of war to the enemy. It has been generally accepted that the unilateral act of a declaration of war is constitutive of a state of war.³¹

The provisions of the Third Hague Convention did not apply where acts of force in the nature of reprisals or pacific blockade might be resorted to, whether as methods of constraint “short of war” or as measures of international police.³²

According to Hague Convention III, the declaration of war is taken as constitutive of a state of war.³³ Such codification on the initiation of war must be considered in the light of both the *jus ad bellum* and the *jus in bello*.

When it refers to the *jus ad bellum* the Convention constitutes the extreme formalization of what had been the doctrine about the right of war. Certain remnants of the idea of *bellum justum* may still be found

that it might be well “to define what is meant by the term ‘war’, for it has often been made under the name of an expedition, as may be learned from numerous instances that can be found in the history of my own country”. See J.B. Scott: *The Confederacy of 1907*. Vol. III; Grob 1949, pp. 173 ff.

³⁰ See the French text in AJIL 1908, Suppl. p. 86 and Oppenheim-Lauterpacht, IntL 1952, p. 293/94.

³¹ Pearce Higgins: *War and the Private Citizen*. 1912, p. 27, observes rightly: “In all discussions on war it must always be remembered that often one of the two disputing States does not want to fight, but that does not necessarily produce a specific solution... We frequently say that it takes two to make a quarrel, but we forget the fable of the wolf and the lamb.” See also Stowell, AJIL 1908, p. 56.

³² See Pitt Cobett: *Cases on International Law*. 1937, 5th ed., p. 20; Westlake 1914, pp. 591/92; Grob 1949, pp. 285-287.

³³ Eagleton 1938, p. 29 sees the most obvious function of a declaration of war in the fact that it establishes a date “upon which the metamorphosis from peace to war takes place.”

in it, in that the war-opening party must give a reasoned declaration of war. The State is judge in its own province, however, in disposing of its right to resort to war. In this light, the Third Hague Convention takes the shape of a procedural law which limits its *jus ad bellum* only in a very formal sense, i.e., the State in resorting to war has to proceed either by declaration of war or by ultimatum. But while this Convention undoubtedly imposes a duty upon the parties, it is not certain that it restricts their powers. A party of this Convention which begins hostilities with intent to make war but without such declaration or ultimatum violates its duty with regard to the other parties of the Convention. Its exercise of power, however, has legal effect and a state of war comes into existence.³⁴

As a rule of the *jus in bello*, Hague Convention III is intended to regularize warfare in its initiation. In this concern particular emphasis has been laid on the right to require compliance with the right of neutrality from third States not taking part in the conflict. It furnished the ground for the rights and duties of neutral powers in the case of warfare on land and sea as established by Hague Conventions V and XIII.³⁵

The state of war as it is under consideration in the Third Hague Convention is an absolute, not a relative condition. It exists in relation to the belligerents and to all neutrals, no matter whether they have been notified or not. This is well illustrated with reference to "The Wirpi" case:³⁶

³⁴ Cf. Q. Wright: *When does war exist?* AJIL 1932, p. 363; M.O. Hudson 1926, p. 1022. Kunz 1935, p. 38, rightly points out that resort to war without declaration of war constitutes for the signatories to Hague Convention III an illegitimate act (*Unrechtstatbestand*).

"Breach of the Third Convention relative to the opening of hostilities was one of the formal grounds invoked by the British Government when it applied the restrictions of the reprisals order to the commerce of Japan. This is an important precedent, especially in view of the substantial breaches of the Convention committed by the Axis Powers in the course of the war." S. Rowson: *Prize Law during the Second World War*. BYB 1947, pp. 160 ff.

³⁵ Baty, AJIL 1936, p. 397 derives from these facts a right for neutral powers to know when war begins. The controversy whether or not a state of war automatically produces a state of neutrality is of no concern under the concept of war in the formal and material senses. In a formal war the status of neutrality is a corollary to the outbreak of war, while in a material war third parties remain free to proclaim or not their neutrality. Cf. Keller: *Die nichtkriegerische militärische Gewaltmassnahme*. 1934, p. 20; E. Castrén: *Neutralität*. ArchivVR 1955, p. 21.

³⁶ Germany, Prize Court of Hamburg, March 28, 1941; A.D. 1943/45, case No. 101. The Finnish steamer *Wirpi*, lying in Norwegian waters, was seized by the German forces which invaded Norway in 1940. The German Government asked for the condemnation of the cargo on the ground that it consisted of contraband. Owners and shippers resisted the motion on the ground that the state of war was inoperative with regard to Finland, who had received no notification as required by Article 2 of Hague Convention III. The Court held that the cargo must be condemned. Rowson, BYB 1947, p. 16, remarks that this was the first time that any question of the Third Hague Convention had been raised in any prize court.

According to the reports, the governing principle is simple. A neutral State could not be bound to observe the duties of neutrality while ignorant of the outbreak of war which creates these duties. But when informed, by whatever means, such a State must not act contrary to the principles of neutrality. The duty to prohibit unneutral acts which might be committed within its territory presupposed the possibility that this duty could be carried out... The rule that a neutral Power could not plead absence of a notification of the outbreak of war if it had obtained the information by other means has been added in order to prevent the possibility of a neutral Government disclaiming responsibility for its acts by referring to the failure to notify even if it had, in fact, obtained information, although not as a result of an official notification. These observations explain the meaning of Article 2 in the following manner:

This rule refers only to the duties of neutral powers. War creates rights and duties on the part of neutrals towards the belligerents which were outlined in the Hague Convention V and XIII of October 18, 1907, concerning Rights and Duties of Neutral Powers in the Case of Warfare on Land and Sea. These duties of neutrality which arise automatically with the outbreak of war, and which, moreover, do not include the prohibition of trade in contraband by individual nationals of neutral States, need not be observed by the neutral Power, without incurring the risk of reprisals, until notice of the outbreak of war has been received.³⁷

II. *The impact of the Third Hague Convention on the legal thought in the field of general international law.*

In general it has been recognized that Hague Convention III created particular international law which could not be said to have merely codified customary international law. Accordingly, even after the codification of this Convention, a declaration of war was not considered to be compulsory under general international law.³⁸ Nevertheless, the codification of rules relative to the opening of hostilities in 1907 has been a major impact on legal thought about war under international law.

Hague Convention III consecrated the general idea that the existence of war under international law depends on the intention of the contending parties and not on the nature of their acts. The legal difference between

³⁷ The statement of the Hamburg Prize Court is rightly considered to be consistent with the preparatory work of the Third Hague Convention. The Ghent Conference of the Institut de Droit International in 1906 confirmed the maxim that the state of war is an absolute, not a relative condition. See also M. Huber: *Das Neutralitätsrecht in seiner neuesten Gestaltung* (1908?) pp. 17 ff.

³⁸ Kunz 1935, p. 38; G.H. Hackworth: *Digest of International Law*. 1943, vol. VI, p. 169; G. Schwarzenberger: *A Manual of International Law*. 2nd ed. 1950, p. 79; Guggenheim, *Traité* 1954, p. 351; Castrén 1954, p. 423. In the course of history Anglo-Saxon countries emphatically denied any obligation to declare war for its initiation. For an opposite view, see H. Ebrén: *Obligation juridique de la déclaration de guerre*. RGDIP 1904, pp. 140 ff.

war and armed reprisal had thereby implicitly found a very strong support. The concept of war was consolidated for general State practice.³⁹ War was said to exist, when any State of the world manifested its intention to make war by some overt act. The latter might take the form of an ultimatum with a time limit,⁴⁰ a declaration of war or some other act revealing the *animus belligerendi* of at least one of the hostile parties. Yet it may often be uncertain whether a situation is an actual war or merely some other kind of armed activity.⁴¹ The Third Hague Convention emphasized the moral obligation under general international law to declare war: The Powers which become engaged in a conflict should make their attitude known and notify it to the outside States in order to enable them to take appropriate measures.⁴²

Furthermore, Hague Convention III reaffirmed that only States are capable of waging war. As a result, the existence of war under international law was made dependent upon States being the belligerent parties; it became generally accepted that the criterion *State* formed an intrinsic part of the notion *war*.

The declaration of war became susceptible, moreover, of creating the legal status of war even in the absence of any actual exercise of physical power.⁴³ This did not imply that war as a state can exist only after a verbal declaration to that effect. Yet the declaration of war alone became sufficient evidence that peace has been transformed into war, and that the law of war has replaced the law of peace.

In municipal law, the right to declare war is very often expressly regulated in the constitution. The notion *declaration of war* in constitutional law derives its signification from general international law as has been developed by Hague Convention III. The pronouncement of a declaration of war, which is meant to be addressed only to the subjects

³⁹ To an opposite effect, Schmitt ZADR 1939, p. 594: "Die Frage, wann der Krieg beginnt, schien früher mehr eine Frage der Bestimmung des genauen zeitlichen Augenblicks und nicht ein sachliches Problem des Kriegsbegriffes selbst zu sein."

⁴⁰ Cf. N. Hill: *Was there an ultimatum before Pearl Harbor?* AJIL 1943, pp. 356 ff.

⁴¹ See the declaration of Señor Elizalde to Mr. Thornton (Buenos Aires) on April 18, 1865: "The Government of Paraguay has... penetrated with armed force into the territory of the Republic, seizing two steamers of the Argentine fleet anchored in the port of Corrientes, firing upon that defenceless town, and thus declaring an unjustifiable war against the Republic." Fontes, *ibid.*, No. 2448. Cf. Hudson 1926, p. 1020; Guggenheim Lehrbuch II, p. 816; Castrén 1954, p. 423.

⁴² For a discussion of the initiation of the Russo-Japanese war of 1906, see Pitt Cobett: *Cases of International Law*. 1937, vol. II, p. 12; cf. N. Ariga: *La guerre russo-japonaise au point de vue continental et le droit international*. 1908, p. 23; F. de Martens: *Les hostilités sans déclaration de guerre à propos de la guerre russo-japonaise*. RGDIP 1904, pp. 148/49.

⁴³ During both World War I and World War II some States between which war had been declared never actually met in conflict. Eagleton, AJIL 1938, p. 22, states that in World War I some South American States occupied a position of belligerency during the war without furnishing a man or a fighting vessel to the armed forces of the Allies.

of the declaring State, nevertheless brings about a state of war under international law.⁴⁴ That is, various juridical consequences in both municipal and international law flow from any such declaration of war.

Last not least, the Third Hague Convention corroborated the general assumption in international law that peace is equally a status, and that there is alternation between the state of war and the state of peace. Evidently the *state of peace* is the necessary corollary to the state of war as was under consideration in Hague Convention III.⁴⁵

Very early the question arose as to whether the request of a State for compliance with the duties of neutrality might equally constitute a state of war. Any such proposition, which has been argued on the ground of Hague Convention III, failed to be supported by State practice. Its significance is that it is of *de lege ferenda*.⁴⁶

This topic is not to be confused with another cognate question, namely whether the declaration of neutrality in regard to an armed conflict is constitutive of a state of war between the two contending parties. A declaration of neutrality, which is not preceded by a declaration of war or some other recognition of war on behalf of the belligerent parties, produces no effect on the relationship between the belligerents. That is, Hague Convention III is not liable of being interpreted *e contrario*: A declaration of war initiates a formal war and brings about *eo ipso* a state of neutrality with regard to third States. A declaration of neutrality, however, without a preceding *animus belligerendi* on the part of the contending parties, does not transform their military contest into a state of war.⁴⁷

⁴⁴ A.D. McNair: *Legal Effect on War*. 2nd ed., 1944, p. 2, holds erroneously with regard to the Russo-Japanese war of 1906: "...having regard to the rupture of diplomatic relations between the two nations, Japan was probably legally justified in her sudden attack on Port Arthur the day before she issued a declaration of war, which even then was only addressed to her own subjects." Italics added.

⁴⁵ See for critics of this assumption Kappus 1936, p. 70; G. Schwarzenberger: *Jus Pacis ac Belli*. AJIL 1943, p. 472.

⁴⁶ See Kunz 1935, p. 10; Keller 1934, p. 38. See also the pertinent observation of Kappus 1936, p. 59: "Daran ist nur richtig, dass dieses Verlangen ein Indiz für den Kriegswillen bedeutet... das aber durch andere Umstände entkräftet werden kann." A dissenting opinion is offered by Anzilotti: "La sola cosa che non può fare è pretendere che l'azione sua non sia guerra ed esigere insieme l'osservanza dei doveri della neutralità."

⁴⁷ To an opposite effect, see Wright AJIL 1932, p. 366: "It is submitted that in case a state using military force disclaims an intention to make war and the victim cannot or does not recognize war, a state of war does not exist until such a time a third state recognizes that it does. Third states sometimes do this by formally proclaiming neutrality and they would usually be obliged to make a decision if hostilities are proceeding on the high seas to the detriment of their commerce." Keller 1934, p. 40, evidently summed up State practice and the dominant opinion in international law by the following statement: "Eine derartige konstitutive Wirkung kann aber den Erklärungen dritter Staaten nicht zukommen. Diese können wohl feststellen, dass ihrer Ueberzeugung nach ein Kriegszustand bestehe, und die sich für sie hieraus ergebenden rechtlichen Folgerungen ziehen, aber sie müssen sich bei dieser Feststellung an das geltende Recht halten, d.h. in erster Linie die Erklärungen der Parteien in Betracht ziehen."

Paragraph 4. Towards a 'jus contra bellum'.⁴⁸

I. The evolution of positive law in the 20th century with regard to legitimate war.

Toward the end of the era of the *jus belli ac pacis* the first signs became evident in favour of a limitation of the *jus ad bellum*. At the Hague Conference of 1907 direct attempts were made to limit the right of discretionary resort to war for the recovery of contract debts. These efforts culminated in the stipulation of Hague Convention II respecting the Limitation of the Employment of Force for the Recovery of Contract Debts.⁴⁹ The so-called Bryan treaties concluded shortly before the outbreak of World War I were further efforts along these lines. They were intended to limit the right to recourse to war by imposing upon the parties the duty not to 'declare war or begin hostilities' during the investigation by, and prior to the report of the conciliation commission.⁵⁰ The High Contracting Parties to these Treaties, however, reserved the right to 'act independently on the subject matter after the report of the Commission shall have been submitted'.⁵¹

In addition to conventions, resort to war was thought to be limited by arbitration treaties. A great deal of them were modelled on the pattern of the Franco-British Arbitration Treaty of October 14, 1903. The arbitration treaties, however, were concerned with juridical disputes between States rather than with the settlement of their political conflicts.⁵²

The creation of a League of Nations for the post-World War I period was intended to bring forth a new legal structure for the maintenance of peace. This was meant to be achieved by abrogating gradually the former *jus ad bellum* and replacing it by an effective *jus contra bellum*. Under the Covenant, "any war or threat of war, whether immediately affecting any of the Members of the League or not is hereby declared a matter of concern to the whole League and the League shall take any action that may be deemed wise and effectual to safeguard the peace of nations".⁵³

The attempts of the League, however, to limit the right of war as an instrument of national policy (see Covenant, Art. 11-16), did not go

⁴⁸ J. Shotwell: *War as an instrument of national policy*. 1929; H. Wehberg: *The Outlawry of War*. 1931; G. Sofronie: *Le Problème des limitations du Droit de Belligérance*. 1934; Bourquin, RdC 1934/III, pp. 473 ff.; Guggenheim, SJIR 1945, pp. 9 ff.; Eagleton 1948, pp. 398 ff.; Guggenheim, *Traité* 1954, pp. 295 ff.; Oppenheim-Lauterpacht, *IntL* 1952, pp. 177 ff.

⁴⁹ AJIL, 1908, Suppl., pp. 81 ff.; Sofronie, 1934, p. 11.

⁵⁰ AJIL, 1913, p. 825.

⁵¹ See AJIL, 1914, pp. 565 ff.; AJIL, 1915, pp. 494 ff.

⁵² Cf. Wehberg, RdC 1951/1, p. 30.

⁵³ Art. 11 of the Covenant.

further than to institute a compulsory procedure which had to be exhausted by the bellicose State before it was entitled to resort to war.⁵⁴

The Covenant was designated to provide means for the prevention of war. In fact, however it does not prohibit war under all circumstances. The provisions of Articles 12, 13, 15 and 16 constitute what has been called a legal 'drag' upon war, but in a variety of circumstances members have retained freedom to resort to war against other states.⁵⁵

Moreover, the clauses of the Covenant which are directed toward

⁵⁴ Certain authors interpreted Art. 10 of the Covenant as containing a general material prohibition of war. Scelle 1948, pp. 852/53 observed: "Tout d'abord, en vertu de l'article 10, l'agression est interdite... Cette première prohibition constitue l'illégalité matérielle de la guerre." Cf. Wehberg 1931, pp. 9/10; A.E. Hindmarsh: *Force in Peace*. 1933, pp. 113 ff. W. Steinlein: *Der Begriff des nicht herausgeforderten Angriffs*. 1927, p. 3, stresses the following distinction between Articles 10 and 16 on the one hand and Article 11 on the other: "Art. 10 und 16, die sich insbesondere dadurch von Art. 11 unterscheiden, dass jener nur den Angriff auf die Gebietsunversehrtheit, dieser dagegen den Ueberfallskrieg im Auge hat, während Art. 11 jeden Krieg und jede Kriegsdrohung umfasst."

"Ist es bei der Verletzung der territorialen Unversehrtheit oder der politischen Unabhängigkeit oder auch bei Vorliegen eines Ueberfallskrieges leicht den Verletzenden als solchen festzustellen, so ist es doch im Hinblick darauf, dass in diesem Zusammenhang der Begriff 'Krieg' wohl nur den Angriff an sich, nicht den zweiseitigen Waffengang bezeichnen soll, nach wie vor steitig, wann eine solche Verletzung die Voraussetzungen eines Angriffs erfüllt. Denn nur in diesem Fall ist sie als das zu bezeichnen, was die Völkerbundsatzung als Erfordernis für die erwähnten Massnahmen verlangt."

For a summary of the historical background of Article 10 see Sir John Fischer Williams: *Some Aspects of the Covenant of the League of Nations*. 1934, pp. 103 ff. That author traces the main idea of Art. 10 back to Alexander I of Russia.

⁵⁵ Hindmarsh 1933, p. 126, with an enumeration of possibly legitimate wars under the Covenant. Cf. Guggenheim, *Traité* 1954, p. 295, n. 4.

Kunz, *AJIL* 1951, p. 532, gives a pertinent summary of the legality of wars under the Covenant: "The League of Nations' Covenant did not abolish war, but discriminated between different wars. The basis of distinction was *not*, as in the classic doctrine, between just and unjust wars, but between legal and illegal wars. The concept of *bellum legale* replaced the concept of *bellum justum*. The illegality of resort to war was not a function of the intrinsic injustice of the cause of war, but of the breach of a formal, procedural requirement. Hence, a legal war could have been waged even between Members of the League by a state which had no just cause of war, whereas a state which fully had a just cause of war could have been guilty of resorting to an illegal war. This is a very different thing from the *bellum justum* doctrine. The military 'action commune' under Article XVI was a sanction in a truly legal sense, not against the 'injustus aggressor' but against an illegal belligerent who had 'resorted to war in disregard of his covenants under Articles XII, XIII or XV.'"

Brierly 1945, p. 64, correctly observes that none of the wars that occurred during the period of the League was initiated by means of one of the gaps, but instead "all of them have either involved direct breaches of a State's obligation under the Covenant, or would have done so if the aggressor had been a member of the League."

the outlawry of war fail to give any definition of war.⁵⁶ The exact concept of war under consideration was to come about only when the League was faced with the delimitation between war and reprisals.⁵⁷ It soon became evident that in practice, States were not yet willing to uphold the intentions of the framers of the Covenant, which was outlawry of war in its material sense. As a consequence, it never became quite clear what was meant by 'resort to war' under Art. 16 of the Covenant. With regard to each specific matter before it, the Council of the League remained free to give to this phrase whatever interpretation it pleased.⁵⁸

In addition the Covenant formulated the principle of what may be called 'attack by legal fiction', which was rested on the idea of collective self-defense. In the event that a 'resort to war' under Article 16 was found by the Council, each member State, by way of legal fiction, was regarded as having been attacked by the covenant-breaking State.⁵⁹

Determined efforts were made to close the loopholes which had been left by the framers of the League with regard to an effective prohibition of resort to war. In the draft of the abortive Treaty of Mutual Assistance of 1923,⁶⁰ the High Contracting Parties were 'desirous to establish the general lines of a scheme of mutual assistance with a view to facilitating the application of Articles 10 and 16 of the Covenant'.⁶¹ In pursuance of this goal they solemnly declared that 'war is an international crime'. Neither this treaty nor the so-called Geneva

⁵⁶ Cf. Fischer Williams 1934, pp. 293 ff. The majority of writers do not examine the nature of the concept of war under the Covenant but instead start out from the distinction between 'legal war' and 'illegal war'. Cf. Sofronie 1934, pp. 22/23.

⁵⁷ After having changed his mind in 1938 in favour of the objective theory of war, Wehberg reached the following conclusion: "Danach verbieten die Völkerbundsatzung und der Kellogg Pakt nicht nur den Krieg im engeren Sinne, d.h. diejenigen militärischen Gewaltmassnahmen, welche den Kriegszustand zur Folge haben, sondern auch jede bewaffnete Gewaltanwendung, die gegen einen anderen Staat in seiner Totalität gerichtet ist."

⁵⁸ Lauterpacht, AJIL 1934, p. 58: "'Resort to war' may be deduced constructively from the recourse to armed force, but it is not synonymous with the use of armed force. The members of the League are competent to establish such constructive resort to war; but they are not under a legal obligation to do so." This opinion is backed up by the so-called 'enigmatic' pronouncement of the Committee of Jurists in 1923.

⁵⁹ Cf. M. Bourquin: *Vers une nouvelle Société des Nations*. 1945, p. 191. After World War II that principle has been integrated in the North Atlantic Pact. In Article 5 of that Pact the parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all; and consequently they agree that, if such an armed attack occurs, each of them, in exercise of individual or collective self-defence recognized by Article 51 of the Charter of the United Nations, will assist the party or parties so attacked by taking forthwith, individually and in concert with the other parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area.

⁶⁰ LoN O.J., 1923, p. 1521; cf. Merle 1949, pp. 36 ff.

⁶¹ See Preamble of that Treaty.

Protocol of 1924 (Protocol for the Pacific Settlement of International Disputes) succeeded in establishing an authoritative prohibition of war.⁶²

Yet, a more effective modification of the peace structure in the 1920's was brought about by the Kellogg-Briand Pact which is often referred to as Pact of Paris.⁶³ Owing to the efforts of France and the United States, this treaty was signed by fifteen nations on August 27, 1928. At the present time it is regarded as binding upon more than sixty States including the Great Powers. In Article I of this Treaty, the High Contracting Parties solemnly declare 'that they condemn recourse to war for the solution of international controversies and renounce it as an instrument of national policy in their relations with one another.'⁶⁴

With the conclusion of the Kellogg Pact, the cornerstone had been laid for the foundation of a *jus contra bellum*.⁶⁵ It was soon evident, however, that its impact on international law lagged far behind its political and moral significance. In the first place, the Kellogg Pact lacked machinery and sanctions for its effective application.⁶⁶ Another shortcoming of this Pact was that the prohibition of war did not

⁶² For a critical view of the Geneva Protocol of 1924 see Wehberg 1931, pp. 30 ff.; Hindmarsh 1933, p. 116, remarks that "laudable as was this effort to extend the operation of sanction to occasions other than resort to *de jure* war, it was unfortunate that a criterion so indefinite as 'aggression' should have been made the basis of guarantees." Although it is true that two important League commissions reported that a satisfactory definition of aggression was impossible, Hindmarsh does not sufficiently take into account that the determination of aggression was in the last resort left to the discretionary power of the League's Council.

⁶³ 94, LoN Treaties, p. 57. For a narrative of the historical and diplomatic background of this Pact cf. Shotwell 1929; Bourquin RdC 1934/III, pp. 478/79; Tucker ILQ 1951, pp. 19 ff.; G. Suarez: *Briand, 1923-1932*. 1952, pp. 258 ff. For a legal evaluation of the Pact see Wright: *The meaning of the Pact of Paris*. AJIL 1933, pp. 39 ff. In 1934 at Budapest the International Law Association adopted Articles of Interpretation of the Pact. Cf. Rep. ILA, 1946, p. 40.

⁶⁴ IMT (blue series) vol. XXII, p. 463: "The question is, what was the legal effect of this pact? The nations who signed the pact or adhered to it unconditionally condemned recourse to war for the future as an instrument of policy, and expressly renounced it. After the signing of the pact, any nation resorting to war as an instrument of national policy breaks the pact. In the opinion of the Tribunal, the solemn renunciation of war as an instrument of national policy necessarily involves the proposition that such a war is illegal in international law; and that those who plan and wage such a war, with its inevitable and terrible consequences, are committing a crime in so doing." See Eagleton 1948, pp. 400/01.

⁶⁵ See Shotwell 1929, pp. 210 ff.; Wehberg 1931, p. 81; Mosler 1948, p. 346; Oppenheim-Lauterpacht IntL 1952, pp. 196/97; Lauterpacht BYB 1953, p. 210.

⁶⁶ Wehberg 1931, pp. 80/81 points out that there was no special organ designated to intervene as a mediator in the name of the signatories of the Kellogg Pact in case of an international dispute. When in July and December, 1929, the United States of America and other powers called the attention of the two parties in the Sino-Russian conflict to the Kellogg Pact, Russia declared that the Kellogg Pact does not provide that any of the signatories have the function of guardians of the Pact.

expressly include the so-called "measures short of war".⁶⁷ The use of the term 'war' in this Pact enabled States to exercise full discretion in deciding whether contentions of States through their armed forces were to be considered as wars within the meaning of the Kellogg Pact.⁶⁸ In this regard the Kellogg Pact had the same serious drawbacks as the Covenant. The former might be, and in practice was, frequently frustrated by the simple device of abstention from a declaration of war.

The fact that within a short period after the conclusion of the Pact its purpose was repeatedly violated, showed that any such effective outlawry of war as an instrument of national policy could not do without (1) an express commitment on the concept of war under such a Pact,⁶⁹ and (2) that the practical potentialities of general instruments of this kind may be illusory if not accompanied by parallel developments in the direction of an effective political organization of the society of States.

The Kellogg Pact owes its importance to the fact that it was the first multilateral convention which provided genuine positive rules for the outlawry of aggressive war. Its legal impact, however, has only been specified after the end of World War II when Allied military tribunals tried German war criminals. The Kellogg Pact was then

⁶⁷ A loophole in the wording of Art. 2 of the Kellogg Pact is that coercive measures short of war have always been regarded as pacific in character and purpose. Hindmarsh 1933, p. 123, rightly says that "the word 'pacific' means associated with a state of peace as distinguished from 'hostile' or 'belligerent' meaning associated with a state of war." See Wright AJIL 1933, p. 53; Hambro, 1936, p. 58.

In addition, certain States, like the United States and Great Britain, had not been willing to subscribe to the Pact without reservations. Cf. Shotwell 1929, pp. 167 ff.; Wehberg 1931, p. 80; McNair BYB 1936, p. 177; A. Wyler: *La paix avec l'Allemagne*. 1951, p. 19; Guggenheim, *Traité* 1954, p. 297, n. 1.

⁶⁸ Cf. Schwarzenberger, AJIL 1943, p. 476. Ray on the contrary holds that with regard to the Kellogg Pact one cannot any longer use the traditional concepts of war and neutrality. J. Ray: *Commentaire du Pacte de la Société des Nations*. 1930, p. 528. Cf. Kunz 1935, p. 8.

⁶⁹ Cf. Ch. Fenwick: *War as an Instrument of National Policy*. AJIL 1928, pp. 826 ff. The term war as an instrument of national policy is not self-explanatory. The statement of Hambro that all wars which are not characterized as instruments of international policy are wars as instruments of national policy does not solve the problem. Hambro 1936, p. 121. Tucker, ILQ 1951, p. 20, raises the question, what constitutes 'war as an instrument of international policy'? He states that "it is clear that enforcement measures taken under then existing international arrangements (principally measures taken under the Covenant and the Locarno Pact) came under this category. Some writers have gone further in their interpretation. Prof. Kelsen has interpreted this provision to imply that the Pact allowed a war waged as a reaction against a violation of international law (and not necessarily, or in addition to, an illegal aggression), since such a war would be waged for the maintenance of international policy."

Cf. H. Kelsen: *General Theory of Law and State*. 1945, p. 334.

Tucker rightly points out that the opinion of Kelsen does not appear to receive support from the official correspondence and interpretation of the Pact.

interpreted in the sense of having made resort to aggressive war a 'war crime'.⁷⁰

The Pact does not legally seem to effect the sovereign power of the parties to convert a state of peace into a state of war by discretionary action, but it has certainly imposed a duty on the signatories to the Pact never to exercise that power except against a State which is already at war.⁷¹ In doing so, it left intact some rules of the traditional *jus ad bellum*. As a consequence, the pact implied the establishment of a hierarchy consisting of three superimposed international orders:

(1) The community of the signatory Powers to the Kellogg Pact. Within this community, any party was prohibited to resort to war as an instrument of national policy.

(2) The community of the League of Nations. In so far as its members had not subscribed to the Kellogg Pact, only an express procedure was to be observed before a legitimate recourse to war.

(3) The œcumenic order including also those States which had neither become members of the League nor signatory powers to the Kellogg Pact. In its relation with these States, the whole œcumenic community had maintained the traditional competence of the *jus ad bellum*.⁷²

The abolition of the remnants of the *jus ad bellum* was only achieved at the end of World War II. It is due to the Charter of the United

⁷⁰ IMT (blue series) vol. XXII, p. 463: "But it is argued that the pact does not expressly enact that such wars are crimes, or set up courts to try those who make such wars. To that extent the same is true with regard to the laws of war contained in the Hague Convention... Many of these prohibitions had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes punishable as offenses against the laws of war; yet the Hague Convention nowhere designates such practices as criminal, nor is any sentence prescribed, nor any mention made of a court to try and punish offenders... In the opinion of the Tribunal, those who wage aggressive war are doing that which is equally illegal, and of much greater moment than a breach of one of the rules of the Hague Convention."

⁷¹ Wright, AJIL 1933, p. 58. This work of Wright was referred to in the trial on the 'Wilhelmstrasse'.

⁷² See Guggenheim, *Traité* 1954, p. 299; Oppenheim-Lauterpacht, *Intl* 1952, p. 183. Thus, in the Chaco war, Bolivia, who had not been a signatory to the Kellogg Pact, had retained her right to resort to war against Paraguay. See Merle 1949, pp. 48/50.

⁷³ IMT (Protocols), Proceedings against v. Leeb (OKW) (9850 ff) No. 832 "Im Kellogg-Briand-Pakt haben die 63 Signatarmächte, unter ihnen Deutschland, ihre Bereitschaft erklärt, auf den Krieg als ein Mittel der *Staatspolitik* zu verzichten. Wenn diese Tatsache einen Beweis dafür darstellt, dass die Meinung der Welt sich in diesem Punkt zu einer hinreichenden Eindeutigkeit durchgerungen hatte, um dem Richter die Feststellung zu gestatten, dass es nach Völkergewohnheitsrecht nunmehr den Begriff des Verbrechens gegen den Frieden gibt — und wir sind der Meinung, dass dies der Fall ist —, dann können wir die Grenzen des Geltungsbereiches dieses Rechtssatzes nicht weiter ziehen, als der Pakt dies rechtfertigt. Die Nationen, die den Kellogg-Briand-Pakt unterzeichnet haben, sahen es als zwingende Notwendigkeit an, dass die zwischenstaatlichen Beziehungen nicht durch Gewalt geändert würden."

Nations as well as to the extensive interpretation of the Kellogg Pact by the Nuremberg Military Tribunals.⁷³ The Charter has equally abolished the hierarchy of international orders which existed under the League of Nations. With regard to the prohibition of resort to force, the Charter is held to be authoritative for both its members and non-members.⁷⁴

In view of this legal situation it would be paradoxical to maintain any longer the term *jus ad bellum*. Even the exceptions to the outlawry of war under the Charter are understood only as modes of sanction to insure respect of the essence of the Charter which is the maintenance of peace. Accordingly, for the era of the Charter, we shall employ the term '*jus contra bellum*' for '*jus ad bellum*', even if thereby the right of legitimate defence or the war of sanction is meant.⁷⁵

II. *The crucial legal problem in the outlawing of war.*

The political idea of the outlawry of war originated by the end of the 19th century. It was sustained by the peace movement which had been organized in the course of the 19th century. As that movement gradually took a stronger hold on public opinion, concrete proposals for an effective outlawry of war were made by laymen rather than by international lawyers. There is no doubt that the movement was fighting at all times for the outlawry of wars in the material sense, i.e., the suppression of the shedding of blood in armed international conflicts.⁷⁶

It was only with the establishment of the League of Nations that statesmen and lawyers were called upon to handle legally the idea of outlawing war. Yet the framers of the Covenant were faced with the task of compromising between the interests of the States and the necessity of stipulating clear and rigid rules for the prevention of war. All major States remained eager to reserve the right of armed intervention, armed reprisal and the so-called "pacific blockade".⁷⁷ On the other hand, the right of self-defence was firmly declared to be a natural right of States. The question was, how to outlaw effectively material war if both the right of armed intervention on the one side and the right to legitimate self-defence on the other were at the same time considered to be inalienable rights of States?

The solution was thought to be found by prohibiting 'resort to war' without giving any definition of what was meant by the term 'war'.⁷⁸

⁷⁴ Cf. S. Hsueh: *L'organisation des Nations Unies et les Etats non Membres*. 1953, p. 106.

⁷⁵ For further details see below pp. 269 ff.

⁷⁶ J.B. Moore: *International Law and Some Current Illusions*. 1924, p. 308.

⁷⁷ See below pp. 131 ff.

⁷⁸ Wehberg 1931, p. 99, remarks that 'according to current opinion, there is war when a state, by military means, resists an invading army. Yet the use of military means outside of war must also be interdicted... There would be no progress if it became customary to avoid studiously the form of war and to use other means of violence'. Cf. Guggenheim, *Lehrbuch II*, p. 759.

except that it was not tantamount to 'self-defence'.⁷⁹ General international law, however, knew at that time only two ways of 'resort to war': (1) a declaration of war bringing about *ipso facto* a state of war; and (2) resort to armed force accompanied by some manifestation of *animus belligerendi* on the part of the resorting State.⁸⁰

It became evident very soon that an effective outlawry of material war was legally to be achieved by outlawing any 'resort to armed force'.⁸¹ When the Geneva Protocol was drafted in 1924, the Dutch delegation proposed the prohibition of all 'recourse to armed force' in order to make the goal of outlawing war legally effective. That suggestion was rejected on the double grounds that (1) States were not yet willing to abandon their right of 'armed reprisal', and (2) States would have been necessarily obliged to apply the 'automatic sanctions' under the Protocol against all military measures of coercion.⁸² This rejection demonstrated in full the difficulties to overcome for an effective prevention of war. Any attempt to outlaw war in the material sense which was based upon the classical notion of war must prove to be inadequate for such a goal. The result of such legal insufficiency was that after World War I, certain States engaged in extended hostilities without the contestants acknowledging it to be war.

Japan's invasion of Manchuria in 1931-32 and her military adventures in China from 1937 onwards, were never officially admitted to be war; the rape of Manchuria was succinctly described as the "Manchurian Affair" and the onslaught on China as the "China Incident". This recourse to sophistry was due to the fact

⁷⁹ Legitimate defence as an inherent right of a State is a concept in the *jus ad bellum*. It must not be mixed up with the plea of self-defence such as is urged on military necessity. Only the latter deals with preventive action in military operations already in progress and belongs to the *jus in bello*. The difference is considerable. Legitimate defence under the *jus ad bellum* is never authorized as preventive action. See Bin Cheng: *General Principles of Law as applied by international courts and tribunals*. 1953, pp. 77 ff. Cheng fails to take into account this difference; cf. E. Giraud: *La théorie de la légitime défense*. RdC 1934/III, pp. 692 ff.

⁸⁰ Cf. E. Borchard: 'War' and 'Peace'. AJIL 1933, p. 114.

⁸¹ It is worth recalling that some of the drafts of the Covenant used this phrase in place of 'resort to war'. Fischer Williams 1934, p. 310, footnote 2, reports that the change in favour of 'resort to war' was made without conscious reference to the problems it involved. See also Wehberg FW 1938, p. 145.

Strangely enough, under the classic theory of war, any prohibition of 'resort to war' produces as a legal term an effect opposite to the spirit of that phrase. All that is prohibited thereby are the privilege of declaring war and hostile acts done with *animus belligerendi*. See Borchard, AJIL 1933, p. 114. As in general it takes two to make a war, a 'resort to war' only takes place if the attacked party resists in self-defence. Any effective prevention of war necessarily must prohibit all unilateral acts of coercion which, by their very nature, bring about war if they are resisted.

Cf. also IMT (blue series) vol. XXII, p. 450: "Whether action taken under the claim of self-defence was in fact aggressive or defensive must ultimately be subject to investigation and adjudication if international law is ever to be enforced."

⁸² Cf. Wehberg, RdC 1951, p. 42.

that Japan, in common with many other states, had signed the Briand-Kellogg Pact of 1928 for the outlawry of war under which the signatories renounced war as an instrument of national policy. By denying that these hostilities were war, Japan hoped to avoid a charge of breaking its treaty obligations. Also a further purpose was to prevent other States declaring their neutrality and hampering Japan's conduct of the hostilities by restrictive neutrality regulations.⁸³

It was by way of multilateral treaties that the prohibition of all 'resort to armed force' found its place in international law as the only means of outlawing material war.⁸⁴ Thereby the concept of 'war in the material sense' had to be necessarily accepted by international law as a legal notion.

Article 2 of the Locarno Treaty prohibited "attack or invasion and resort to war". There is no repetition in this phrase. 'Resort to war' concerned the concept of war in its classical, formal sense which implies the *animus belligerendi* on behalf of the peace-breaking State. 'Attack and invasion' are two specified expressions of resort to armed force. In view of the fact that the right of legitimate defence remained unaffected it was recognized that war in the material sense could be prevented only by prohibiting both attack and invasion.⁸⁵

Instead of such specifications of resort to armed force, preference was given more and more to the general phrase of 'resort to force' in subsequent draftings, bilateral and multilateral treaties aiming at the prevention of war.⁸⁶ This is because the meaning of 'resort to force' is less liable to juridic sophistry than are any of its specifications.

⁸³ J.G. Starke: *An Introduction to International Law*. 1947, p. 258; see also P.M. Brown. *Undeclared Wars*. AJIL 1939, p. 541.

⁸⁴ See Wehberg, RdC 1951, p. 61.

⁸⁵ The French note of March 26, 1928 to the Kellogg Pact proposed that the nations should agree "not to resort to any attack or invasion". Cf. Wehberg 1931, p. 75.

⁸⁶ On January 21, 1931 the delegations of Germany, Great Britain, France and Italy adopted the declaration, that they make use of the League of Nations in order to avoid any resort to force. LoN, C. 144 M. 45, 1931, VII, p. 54.

In the Soviet-French Pact of Non-Aggression on November 29, 1932, the contracting parties declared in Article 1: "Chacune des Hautes Parties contractantes s'engage vis-à-vis de l'autre à ne recourir... ni à la guerre, ni à aucune agression par terre, sur mer ou dans les airs." Colliard: *Droit international et Histoire Diplomatique*. 1948, p. 327. LoN, Resolution of the Political Commission on March 2, 1933: "Les Gouvernements... interdisant expressément le recours à la force dans les conditions où le Pacte de Paris interdit le recours à la guerre." In Wehberg, RdC 1951, p. 54.

The Four Power Treaty of June 7, 1933, provided as follows:

"Les représentants... fidèles aux engagements... et se référant à la déclaration de non-recours à la force, dont le principe a été proclamé dans la déclaration signée à Genève le 11 décembre 1932 par leurs délégués à la Conférence de Désarmement et adopté le 2 mars 1933 par la Commission politique de ladite Conférence..." A. Zousmann: *Le Pacte à Quatre*. 1934, p. 18.

The German-Polish Treaty of January 26, 1934 provided that "en aucun

On the one hand it is clear that a merely economic reprisal, even if not permissible by reason of an existing treaty, as for example the imposition of a general and prohibitive tariff on all imports from the opponent State, is not a 'recourse to armed force'. It does not involve the employment of the army, navy or air force of the State. On the other hand it is ...clear that the seizure of a port by a naval force, however pacific in intention, is a 'recourse to armed force', even if no gun is fired; but for the presence of the armed force you could not do what you have done. If there is resistance and guns are fired, whether with or without consequent loss of life or destruction of property, the case is clearer still.⁸⁷

The Charter of the United Nations embraces this principle by providing for the outlawry of war in terms of the prohibition of resort to 'threat or use of force' (Article 2 par. 4).⁸⁸

Paragraph. 5. The concept of war in the "jus contra bellum".

1. "War" has a different meaning under general international law from that in international penal law.

Any attempt to set up a *jus contra bellum* necessarily implies the creation of an international penal law if the outlawing of war shall ever be successful. Since the codification of the Covenant of the League of Nations the struggle for the outlawry of war went hand in hand with the establishment of an international penal law which must be regarded as a special branch in international relations.⁸⁹ The Charter of the United Nations, which is essentially a *jus contra bellum*, does not refer

cas la solution de telles difficultés ne sera obtenue par la force". Colliard, 1948, p. 332.

The Atlantic Charter of August 14, 1941 states in its paragraph 8: "Ils ont la conviction que toutes les nations du monde, tant pour des raisons d'ordre pratique que d'ordre spirituel, devront renoncer finalement à l'usage de la force." Colliard 1948, p. 394.

For further treaties prohibiting the resort to force see Wehberg, RdC 1951/I, pp. 53 ff.; Steinlein 1927, pp. 28 ff.

⁸⁷ Sir John Fischer Williams: *The Covenant of the League of Nations and War*. 1933, p. 16.

⁸⁸ Cf. Pompe 1953, p. 51: "In the terminology of the United Nations in the Charter of which the term 'war' does not occur, the identity between 'aggression' and the 'use of armed force' has become firmly established. In its new meaning the term 'aggression' comprises every extra-territorial use of force and the question of the definition of aggression is now not only that of the attribution of responsibility for a conflict but also, and primarily, that of specification of the obligation of the States to abstain from that use of force."

⁸⁹ The international penal law rests on the principle that States have become liable of punishment for illegitimate resort to war. "Le droit international, avant et après le Pacte de la Société des Nations et le Traité Général de Renonciation à la guerre, reconnaît que les Etats sont susceptibles d'être punis." Lauterpacht, RdC 1937/IV, p. 353.

For a survey of the doctrine of international penal law see C.A. Pompe: *Aggressive War an International Crime*. 1953, pp. 165 ff.; Glaser 1954.

explicitly to any of the principles of international penal law which have been either laid down in legal theory or even expressed in the London Agreement for the punishment of European Axis war criminals. It follows that the Charter relies in the first line on those principles of the international penal law which have been brought about by custom.⁹⁰

Concepts of penal law have their independent characteristics. As to the concept of war, there is little wonder that it has acquired a different meaning in the province of international penal law from what is understood by it in general international law.⁹¹ The *jus contra bellum* is necessarily preventive to the outbreak of war; international penal law must therefore take into consideration not only all acts liable of initiating war, but also the intention of those which may be made responsible for an eventual outbreak of war. It follows that:

war in general international law is concerned with the relation or situation in which States or individuals are engaged — hence war is considered in itself and apart from those involved;

war in international penal law is concerned with the criminality of an act called 'aggressive war' and therefore deals with the motives behind military actions or other threats to international peace, if a breach of international peace may result from them.⁹²

Since the codification of a *jus contra bellum* has been achieved, any approach to the problem of war must be determined as to whether it is made in the province of international public law or in that of international penal law. As the difference is one of substance and not only one of degree, it is evident that the concept of war in general international law, which is bilateral, does not exclude a concept of war in international penal law which may be unilateral.

⁹⁰ V.V. Pella: *Fonctions Pacificatrices du droit pénal supranational et fin du système traditionnel des Traités de Paix*. RGDIP 1947, p. 19, declares that "nous nous trouvons actuellement dans une phase de transition entre les méthodes diplomatiques traditionnelles découlant de la conception *guerre-institution légale* et les nouvelles méthodes qu'implique la reconnaissance de la conception *guerre-crime international*."

Cf. P. Berger: *Bindung an Präjudizien im Völkerrecht?* Oesterreichische Zeitschrift für öffentliches Recht, 1954, p. 327 reasonably poses the following question: "Abzuwarten bleibt... ob nicht endlich im Falle, dass das Kriegsglück sich die Waage hielt, — wie in dem gegenwärtigen koreanischen Krieg —, beide Parteien, nach älteren Beispielen, gegenseitig auf Bestrafung verzichten oder einander ihren Staatsangehörigen im Friedensvertrag ausdrücklich Straflosigkeit zusichern werden."

⁹¹ Stone 1954, p. 34, admits that war "could have another meaning for the international judge than the one it has for the international governmental organ which has to deal with recent situations, which necessarily disposes of less information and documents and for which the intention and responsibility of the acting agent are not the overriding criteria."

⁹² Pella RGDIP 1947, p. 21, wants, as far as Germany is concerned, to extend the prophylactic concept of war in international penal law to the following effect: "...il ne s'agit pas de résoudre uniquement le problème du crime international réel, mais aussi celui du crime international en puissance."

Another impact of the establishment of a *jus contra bellum* is that the concept of war in the province of general international law has become discriminative.⁹³ No matter whether the infringement of the *jus contra bellum* results in a formal or material war,⁹⁴ the belligerency of one party will be that of a war of aggression while the same armed contest is a war of sanction for the other party.⁹⁵ In an international society which would be under the efficient rule of the United Nations Charter the authority of that discrimination would remain within the competence of that institution.⁹⁶ With regard to the implication of that discrimination upon the law of war, however, it is up to the victorious party to avail itself of the benefits flowing from the discriminating character of the concept of war in a society of collective security.

II. Comparison between "aggressive wars" as considered in international penal law and "wars of aggression" in the doctrine of international public law.

A. The notion of 'aggressive war' in international penal law.

It is only after 1919 that the notion of 'aggressive war' was developed in international penal law as having a significance independent of the concept of war under general international law. Before that the

⁹³ C. Schmitt: *Die Wendung zum diskriminierenden Kriegsbegriff* 1938, p. 47, offers the opinion that the discriminating character of the concept of war in a society of collective security is no longer compatible with the idea of a notion of war (*Kriegsbegriff*): "Dadurch, dass mit Hilfe einer beim Genfer Völkerbund liegenden Unterscheidung von völkerrechtlich zulässigem und völkerrechtlich unzulässigem Krieg der diskriminierende Kriegsbegriff wenigstens im Ansatz institutionalisiert wird, lässt sich zwar die ganze bisherige Völkerrechtsordnung aus den Angeln heben, aber keine neue Ordnung schaffen." Cf. also C. Schmitt: *Positionen und Begriffe*. 1940, p. 245. To the same effect Pompe 1953, pp. 37/38: "The 'state of war' disappeared the moment a higher instance received the competence to decide that a given resort to war was an illegal act... the same juridical concept cannot be used to indicate simultaneously a lawful and an illegal proceeding." Cf. W. Schätzel: *Aggressionskrieg und Haager Kriegsrecht*. Acta Scandinavica, 1954, p. 17.

⁹⁴ Cf. Hindmarsh AS Proceedings 1938, p. 121, who urges a liberal interpretation of the word 'war'; Wehberg FW 1938, p. 147.

⁹⁵ In World War II the United States of America discriminated against the German Government and assisted the enemies of Germany on that ground. Wright: *Repeal of the Neutrality Act*. AJIL 1942, p. 20, declares that the U.S.A. acted thereby 'not in its own defense, not to remedy its own injuries, but to frustrate the success of a government which had outlawed itself by its violation of the basic principles of international law. This behaviour was justified because of the permission which international law gives all states to act in support of the international community against basic attacks upon its law.' The abandonment of neutrality by the U.S.A. is said not to be of "the nature of a civil remedy but of a preventive or deterrent to crime."

⁹⁶ It is the continuance of resort to armed force which, when met with the sanctions of the United Nations, marks the criminal character of the initial action. Cf. Lauterpacht, BYB 1953, p. 208; Tucker, ILQ 1951, pp. 11 ff. comes to the conclusion that "the basic objections put forward against the possibility of interpreting war as a sanction or a delict still stand." (p. 33.)

terms 'aggression' and 'acts of aggression' had been used restrictedly in the sense of 'acts of war' in particular conventions of non-aggression, alliance and guarantee.⁹⁷ The League of Nations, at the very moment of its creation, was given a first indication of the discriminatory meaning of *aggressive war* by way of Article 231 of the Treaty of Versailles. That Article based Germany's obligation to reparation on the premise that World War I had been imposed on the Allied Powers by the aggression of Germany.⁹⁸

Article 10 of the Geneva Protocol of 1924 was another step in describing the meaning of 'aggression' as an act of force which whether by its nature is unlawful under international law or which has been declared illegitimate by international adjudication.⁹⁹ Aggression was thereby given the meaning of a political and not merely a military act, for 'the distinction lies in the political conditions which are violated and not in the violation of actual territory'.¹⁰⁰

⁹⁷ See Pompe 1953, p. 40.

⁹⁸ Article 231 of the Treaty of Versailles reads as follows:

"The Allied and Associated Governments affirm and Germany accepts the responsibility of Germany and her allies for causing all the loss and damage to which the Allied and Associated Governments and their nationals have been subjected as a consequence of the war imposed upon them by the aggression of Germany and her allies."

Craig-Gilbert: *The Diplomats 1919-1939*. 1953, p. 143, observes that "the insertion of the word 'causing' changed what would have otherwise have been only a financial liability into a causal responsibility. Thereby 'aggression', a word that in the Lansing note (and in Art. 232) described only military actions after the outbreak of the war, could change its meaning so as to include events and plans prior to the war."

Cf. Lauterpacht, BYB 1953, pp. 234/35.

⁹⁹ Under this Article it was stated amongst others that "any State shall be presumed to be an aggressor... if he has refused to submit the dispute to the procedure of pacific settlement... or to comply with a judicial sentence or arbitral award..." Schmitt 1940, p. 245, holds that this evolution under the League with regard to war is fostered by a legal synonymy of 'aggressor' and 'enemy': "Im Paktsystem der Genfer Nachkriegspolitik wird der Angreifer als Feind bestimmt. Angreifer und Angriff werden tatbestandsmässig umschrieben, wer den Krieg erklärt, wer eine Grenze überschreitet, wer ein bestimmtes Verfahren und bestimmte Fristen nicht einhält usw., ist Angreifer und Friedensbrecher. Die völkerrechtliche Begriffsbildung wird hier zusehens kriminalistisch-strafgesetzmässig."

¹⁰⁰ Shotwell 1929, p. 215. To the same effect R. Redslob: *Histoire des grands principes du droit des gens*. Paris, 1923, p. 282: "L'agresseur n'est point celui qui accomplit le premier fait d'armes ou qui franchit le premier la frontière ennemie. L'agresseur est l'Etat qui commet un empiètement tel sur la souveraineté d'autrui, que l'adversaire est réduit à la lutte armée comme à un dernier moyen de salut. Peu importe que l'empiètement revête telle forme ou telle autre... pourvu qu'il soit assez grave pour motiver le recours à la force."

Pompe 1953, p. 42, rightly observes in this regard that "in so far as the 'aggression'... was also applied to purely political acts these acts were seen from the angle of the ensuing war which they caused and there remained, thus, a connection between 'aggression' and military force. Once taken out of the framework of military conflicts, the concept 'aggression' can, in principle, be used for any act of a State which effectively harms an essential interest of another State."

When, after 1919, the concept of 'aggression' was transferred from the field of particular treaties of alliance or neutrality to that of universal or multilateral covenants in which the rights and obligations of the associated States were defined in general, the term was further loosened from its close association with war or armed conflict. Aggression then became every extra-territorial use of force of whatever extent, whether or not it creates for the 'attacked' State the necessity to react on war level.¹⁰¹

The subject matter, however, remained restricted to the province of wishful thinking as long as State practice could avoid its being taken into consideration on the ground that "no enquiry into the question of responsibility for the war" should be made "as long as there is any possibility of peaceful settlement. An enquiry would only be in place if all such possibilities had vanished".¹⁰² All that was achieved in doctrine until the constitution of the Charter which set up an International Military Tribunal for the trial of war criminals of the Axis powers, was the recognition of the rule: "Aggression gives the right of legitimate self-defence".¹⁰³ The legal impact of this rule could be said with

¹⁰¹ Pompe 1953, p. 51. In legal theory Glaser's pattern of approach to the concept of war in international penal law may be fairly generalized:

"Il est bien entendu que nous ne prenons comme objet de nos investigations que la guerre d'agression dans le vrai sens de ce terme, notion qui exclut donc l'idée de toute autre guerre: qu'elle soit défensive, punitive, entreprise en application d'une décision ou recommandation d'un organe compétent, ou comme intervention d'humanité. En d'autres termes, il s'agit pour nous d'examiner le caractère légal et le caractère criminel d'une agression armée et non provoquée, ou plus simplement d'une agression qui ne se laisse justifier, en aucune façon, du point de vue du droit international.

Etant donné que le droit international n'est pas jusqu'à présent un droit codifié mais est encore à l'état de droit coutumier, et qu'en conséquence le droit pénal international, lui aussi, ne contient pas des notions d'infraction bien précises, donc n'est pas, comme le droit pénal interne ou national, un droit d'"états de fait" bien déterminés ("Tatbestandrecht", comme disent les Allemands), il faut, pour répondre à cette question, se référer à la nature même du droit international, voire à son *fondement*, à son *but* et à ses *Sources*." S. Glaser: *Introduction à l'étude du Droit International Pénal*. 1954, p. 39. With regard to the recognition of the 'international penal law' in Communist legal thought, Muszkat declared: "Viele Autoren negieren die Existenz eines besonderen Rechtszweiges unter der Bezeichnung "internationales Strafrecht" (z.B. Korecki in "Sowjetstaat und Sowjetrecht" 1949 Heft 8 S. 26 russisch). Sie sind der Meinung, dass es hier um Bestimmungen geht, die teilweise im (staatlichen) Strafrecht und teilweise nur im Völkerrecht enthalten sind. Andere Autoren jedoch (z.B. Krylow in "Sowjetstaat und Sowjetrecht" 1954 Heft 7 S. 77 russisch) sprechen von einem "internationalen Strafrecht". M. Muszkat: *Zum zehnjährigen Bestehen der Nürnberger Grundsätze*. Neue Justiz, 1955, p. 615.

¹⁰² Conclusion of the League's Commission to the Chaco War, reached in 1935. Cf. AJIL 1934, Suppl., pp. 198 ff.; Pompe, 1953, pp. 26, 46.

¹⁰³ Shotwell, 1929, p. 209. His definition of 'defence' is construed as being "merely the obverse of that of aggression." See *ibid.*, pp. 213, 217. Cf. A. Vignol: *Définition de l'agresseur dans la guerre*. 1939. Bourquin, RdC 1934/III, pp. 479/80; Giraud, RdC 1934/III, pp. 692 ff.; Q. Wright: *The Concept of Aggression in International Law*. AJIL 1935, p. 387.

certainty to impose a liability for damages caused by the act of aggression, while the party acting in self-defence was exempted from any liability for its acts done in resistance to the act of aggression.¹⁰⁴ With the exemption of this well-established rule, all other efforts for the outlawry of war of aggression remained in the field of legal controversy. In particular, the numerous attempts to define aggression for the needs of the Covenant failed to bring about an authoritative interpretation of acts of aggression.¹⁰⁵

The Charters of the International Military Tribunals at Nuremberg and Tokyo defined as a crime the initiation of *aggressive war*.¹⁰⁶ Neither the Charter nor the Prosecution nor the Tribunal itself tried to define the concept of *aggressive war*. It soon became evident that the intention of the drafters of the Nuremberg and Tokyo Charters had been to "give the Tribunal, by explicit provision, the competence to determine that a certain act or series of acts constituted war" without being bound by the concept of war in general international law or by the intention of the parties involved in the event they had not admitted the existence of war at the time of the conflict.¹⁰⁷ The Tribunals, following the Indictments, adhered to this line in judging rather upon the intention of the defendants than upon the results their political and military leadership had produced in specific cases.¹⁰⁸ It was expressly admitted that the Tribunal did not worry about the concept of war as is generally

¹⁰⁴ Cheng 1953, p. 62.

¹⁰⁵ Nor was there any positive rule which expressed the individual responsibility of statesmen and soldiers for the commission of acts of aggression. H. Wehberg: *Die völkerrechtliche Verantwortung von Individuen wegen Friedensbruchs im Zeitalter des Völkerbundes*. Festschrift Laun 1953, pp. 379 ff. reaches the following conclusion: "Mit voller Sicherheit kann aus den vorhergehenden Ausführungen der Schluss gezogen werden, dass im Jahre 1939 kein völkerrechtlicher Satz des Inhalts bestand, wonach Individuen wegen Verbrechen gegen den Frieden strafrechtlich verfolgt werden konnten."

¹⁰⁶ Glaser 1954, p. 55, holds the view that the International Military Tribunal did no more than to specify a customary rule when it declared aggressive war to be a crime.

¹⁰⁷ V.V. Pella: *Fonctions Pacificatrices du droit pénal supranational et fin du système traditionnel des Traités de Paix*, RGDIP 1947, p. 7, asserts that the so-called International Military Tribunals at Nuremberg and Tokyo were in reality not international criminal jurisdiction by inter-allied jurisdiction. For a review upon that question cf. I. Lütem: *Some Controversial Aspects of War Crimes*. Annales de la faculté de Droit, Istamboul, 1953, pp. 146 ff. at p. 151.

¹⁰⁸ With regard, for instance, to the Japanese attacks launched on December 8, 1941, against the United States and the British Empire, the Tokyo Tribunal declared: "They were unprovoked attacks, prompted by the desire to seize the possessions of these nations. Whatever may be the difficulty of stating a comprehensive definition of 'war of aggression', attacks made with the above motive cannot but be characterised as war of aggression." Pompe, 1953, pp. 30/31, is wrong in his contention that this statement is not intended to clarify the concept of war. On the contrary, this statement emphasizes more than any other the specific meaning of the concept of aggressive war in international penal law which is determined by the intention as well as by facts.

understood in international treaties, agreements, or assurances, i.e., the bilateral concept of war in the formal and material senses:

The Tribunal has decided that certain of the defendants planned and waged aggressive war against twelve nations, and were guilty of this series of crimes. This makes it unnecessary to discuss the subject in further detail, or even to consider at any length the extent to which these aggressive wars were also "war in violation of international treaties, agreements, or assurances".¹⁰⁹

The concept of 'aggressive war' in the Charter of the International Military Tribunal has been shaped according to the specific characteristics of any penal law.¹¹⁰ The element of aggression constitutes the penal element of that notion.¹¹¹

If war as such still has any meaning it is principally that of a certain *situation* which, however regrettable, cannot by itself be the object of penal law. The additions 'of aggression' or 'aggressive' lifts the concept of war from the neutral field of pure fact and indicates an action and a responsible actor. In connection with aggression, 'war' does not stand for a certain situation of international relations or a certain form of military combat, but for the unilateral conduct of one of the States involved in the conflict.¹¹²

Whatever may be the legal ground on which the International Military Tribunals gave its 'penal' interpretation of the term 'aggressive war', its importance is that of a precedence which is indicative of *de*

¹⁰⁹ IMT (blue series) Vol. XXII, p. 459.

¹¹⁰ Tucker, ILQ 1951, p. 23, n. 24, offers the opinion that the concept is based on the *bellum justum* theory in view of the fact that the wording of Art. 6, par. A of the Charter of the I.M.T. "distinguishes between the act of waging war of aggression and the act of waging war in violation of international treaties. Either the phrase 'war of aggression' must be considered as superfluous and even misleading, which evidently was not intended, or it must be concluded that a distinction is made between the just and the unjust war." Cf. also *History of the United War Crimes Commission, and the Development of the Laws of War*, 1948, p. 257 and Pompe, 1953, p. 26, n. 1.

¹¹¹ Pompe rightly points out that the International Tribunal at Tokyo gave such a broad interpretation of aggression that its military element was completely lost and the term "began to indicate all sorts of interstate acts, prohibited by international law, by *comitas* or by international morality — from which a state suffers some prejudice in one field or another". Pompe 1953, pp. 51/52.

¹¹² Pompe 1953, p. 39. In the post-World War II period it has been said that the Russian blockade of Berlin constituted an act of aggression. "It is an act of aggression against Britain, America and France to close, by military force, roads and railway which these states have an established treaty right to use. It is an act of aggression against the city of Berlin to attempt deliberately to starve 2,000,000 of its population." *The Observer*, June 27, 1948. Lütem 1953, p. 164, observes that the same argumentation was followed by Communist China in connection with the Korean War towards the United Nations.

lege ferenda but which does not by itself make *lex lata*.¹¹³ Even in the event that the connotation given to 'aggressive war' in the War Criminal Trials at the end of World War II will be the basis of international law of the future, the 'raison d'être' of the concept of war in the formal and material senses in general international law were by no means objected to.¹¹⁴ For, as it was expressed in the *German High Command Trial*:

the world has not arrived at a state of civilization such that it can dispense with fleets, armies and air forces, nor has it arrived at a point where it can safely outlaw war under any and all circumstances and situations. Inasmuch as all war cannot be considered outlawed, then armed forces are lawful instrumentalities of State, which have internationally legitimate functions.¹¹⁵

B. 'Aggressive war' as practised by the Military Tribunal at Tokyo
in the trials of the Japanese War Criminals.¹¹⁶

(1) The armed hostilities at Lake Khasan in 1938.¹¹⁷

Armed hostilities took place from July 31st till August 11th between Japanese and Russian border troops at Lake Khasan. The conflict grew out of a border incident typical for these regions where each party justified its measures by the crossing of the frontier by the other party.

¹¹³ M. Bourquin: *Pouvoir scientifique et Droit International*. RdC 1947/I, pp. 389/90: "Le procès de Nuremberg vient de donner un brusque relief à cette catégorie de sanctions collectives dont il est à remarquer que le champ d'application déborde sensiblement celui des mesures prévues par la Charte des Nations Unies contre l'Etat agresseur. Ici, en effet, ce ne sont pas seulement les 'crimes contre la paix' qui sont punis mais aussi les 'crimes de guerre' et les 'crimes de lèse-humanité'."

For the Communist de *lege ferenda* thought about 'aggression', cf. Muszkat, Neue Justiz, 1955, p. 615: "Auf Initiative der UdSSR studiert seit 1951 ein Sonderkomitee, anfänglich die Kommission für Völkerrecht, das Problem einer Definition der Aggression. Der Sowjetische Entwurf für die Definition der Aggression, der zwischen der unmittelbaren Aggression, dem bewaffneten Angriff, und der mittelbaren, der ökonomischen und ideologischen Aggression unterscheidet, enthält eine Reihe wichtiger Elemente für die Präzisierung des Begriffs internationaler Verbrechen."

¹¹⁴ Kelsen, ILQ 1947, p. 170, concludes from the fact that the London Agreement for the punishment of European Axis war criminals has not been inserted into the Charter of the United Nations, the latter still stipulates "only collective responsibility of the States as such for violations of the Charter, imputable to the responsible State, not to the acting individuals".

¹¹⁵ A.D., 1948, No. 119, p. 380.

¹¹⁶ The Charter is, together with the Indictment and Opening Statement, published in *Trial of the Japanese War Criminals*, Department of State Publication, No. 2613, Far Eastern Series 12, Washington, 1946. No publication of it has so far been given to the Judgement, either in whole or in part. The following facts are largely drawn and reproduced from Pompe, 1953, pp. 24-33.

Among the 'aggressive wars' on grounds of which a number of the defendants were convicted, the following military contests had the status of formal war and were in consequence recognized by the Tokyo Tribunal without comment as being wars:

(1) the war between Japan and the United States: After the Japanese attack on Pearl Harbor and Kota Baru on December 8, 1941, declarations of

The border skirmishes developed into regular military operations which caused casualties to both parties. Reinforcements of the Japanese troops were sent to this territory. According to the Tribunal the latter had been "defeated and practically wiped out" when on August 10, 1939, Shigemitsu and Molotov agreed on a settlement of the conflict. In fact that agreement terminated an international armed conflict which had acquired all the characteristics of a true material war. The Tokyo Tribunal certainly relied on these facts; for the purpose, however, of submitting these facts under the concept of 'aggressive war' it presented its argument as follows:

Though the force employed was not very large, the purpose above mentioned¹¹⁸ and the result if the attack had been successful¹¹⁹ are sufficient in the opinion of the Tribunal to justify describing the hostilities as war.¹²⁰

(2) The military operations in the territory of Khackhin-Gol River in 1939.

Military operations between Russian and Japanese forces occurred in the territory of the Khackhin-Gol River in Outer Mongolia in 1939 at a time when the latter was occupied by Russian troops by virtue of an agreement with the Mongolian government, the later People's Republic of Mongolia. In May, 1939 Japanese reconnaissance troops attacked Russian-Mongolian border reinforcements and in the combats carried on for four months, over a front of 50 by 25 kilometers, the Japanese, according to the Judgement, were defeated, leaving 50,000 men on the battlefield while Soviet troops lost only 9,000 men.

The initiative for this action, motivated by an unsettled border dispute, was taken by the local Japanese commander, and Tokyo was only informed in the course of the fighting. The dispute was only settled long after the fighting had ceased by a mutual withdrawal of the troops. On June 9, 1940, the Togo-Molotov agreement was signed and was later confirmed in the Japanese-Russian treaty of neutrality in 1941.

war were exchanged between Japan on the one hand and the United States of America and the British Commonwealth of Nations on the other.

(2) the war between Japan and the Netherlands: The Netherlands, not being attacked and acting in self-defence, as the Tribunal determined, declared war upon Japan even before the United States and the British Commonwealth had done so.

(3) the war between Japan and China: This armed conflict which had been opened by the incident of the Marco Polo Bridge in 1937 constituted a material war until 1941 when, after Pearl Harbor, the Republic of China declared war on Japan and thereby transformed that material war into formal war.

¹¹⁷ Cf. C.W. Tinch: *Quasi-War between Japan and the U.S.S.R. 1937-1939*. World Politics 1951/III, pp. 174 ff.

¹¹⁸ i.e., the restoration of the frontier according to the Japanese wishes.

¹¹⁹ This result is not specified.

¹²⁰ Pompe 1953, p. 28, declares that "the material elements of this war, its extent and duration, being weak as they are, the whole qualification as such hangs on the silk thread of the intention, the 'animus' of certain ministers in Tokyo who knew about the hostilities."

The Tokyo Tribunal readily took account of this material war in order to characterize it as an 'aggressive war' in the sense of international penal law. As, however, this material war had been initiated without the consent of the Japanese government, the court could not liken this war to the 'aggressive wars' under the Charter other than on grounds of the general intention of Japan "to exterminate the enemy troops".

(3) The Japanese occupation of Indo-China.

The occupation by Japanese troops of portions of French Indo-China, which Japan had forced France to accept, was at the outset performed without any clash of arms. Only as late as March 1945, when a Japanese ultimatum demanded the command over all local French troops and the control of the military means of communication, did fighting break out in different places, since the French Governor had refused to give way to the ultimatum. It remains doubtful whether the different acts of resistance can be regarded as open warfare. After a month the French resistance was broken.

The Tokyo Tribunal did not follow the Prosecution which had charged this occupation as an aggressive war right from the beginning. The march through and the partial occupation of Thailand by Japanese troops which lasted till 1945 was refused the qualification of 'aggressive war'. The court justified that refusal in stating that (1) there had been in the years preceding December 8, 1941, the date of Japan's occupation of Thailand, "a position of complicity and confidence" between the two countries; (2) when the Japanese crossed the border, negotiations had already taken place for the conclusion of a treaty of alliance which, in fact, was signed two weeks afterwards and in which the military situation was regulated; (3) "no witness on behalf of Thailand has complained of Japan's actions as being acts of aggression".¹²¹

The findings of the Tokyo Tribunal with regard to 'aggressive war' under international penal law followed by and large one main line: In the first place the court took into consideration all military contests which could be said to be either war in the formal sense or war in the material sense. The Charter of the Tokyo Tribunal expressly entitled the court to take into account both formal and material war in that it contained the words 'declared or undeclared' as a specification of aggressive war. In the second place the element of aggressive intention had to be demonstrated before the crime of aggressive war could be admitted. The Tokyo Tribunal made it abundantly clear that the subjective element of 'aggressive intention' takes precedence over aggression

¹²¹ Pompe 1953, p. 30: "In this case also, though on the side, the highest authorities of the State were not involved in the decision, but the situation is complicated by the fact that in the mother country the government of 'Free France', which had already declared war against Japan after Pearl Harbor, had in the meantime replaced the Vichy government. The Tribunal, however, does not pay any attention to this circumstance."

as a fact and that it is decisive in the last resort of whether or not the crime of aggressive war has been committed under international penal law. The substantiation of the element of aggressive intention unfortunately bore in several instances the marks of arbitrariness and artificiality.

C. The notion of 'war of aggression' in general international law.

The notion of 'war of aggression' refers to the concept of war in the formal and material senses which, in a society of collective security, has become discriminative with regard to the belligerent parties.¹²² The point of departure for this concept of aggression is the existence of an armed conflict initiated by either a declaration of war or by some overt military act which is resisted by armed forces of the attacked State. In recent times the notion of 'war of aggression' in general international law has been of concern in the Sino-Soviet Treaty of Friendship, Alliance and Mutual Assistance, concluded in Moscow on February 14, 1950. This treaty restricts in its Article 1 the *casus quo* to "the event of one of the High Contracting Parties being attacked by Japan or States allied with it, and thus becoming involved in a state of war".¹²³

As any definition has its loopholes, the crucial problem is therefore one of defining the specific military acts the first author of which must be considered as the initiator of the conflict, as the aggressor responsible for the war.¹²⁴ The determination of the aggressor under the Charter of the United Nations is facilitated since the Resolution 'Duties of States in the event of the outbreak of hostilities' ¹²⁵ recommended "that the conduct of the States concerned in relation to the matters covered by the foregoing recommendations be taken into account in any determination of responsibility for the breach of peace or act of aggression".¹²⁶

¹²² Reut-Nicolossi: *Die Wandlung des Krieges vom Rechtsverhältnis zur Revolution*. 1937, p. 679, offers the opinion that aggressive war in an organized international community is not war but revolution. From this he draws the conclusion that the aggressor could be punished according to the old maxim *vae victis* which needs no law. The point was taken up in the *Greiser Trial* where the Supreme National Tribunal of Poland maintained that the aggressive war of Germany against Poland was no war but a criminal invasion. From this premise the court drew the conclusion that the ensuing occupation of Poland by Germany could not be regarded as an occupation in the classic sense of international law. 13, War Crime Reports, 1949, p. 110.

¹²³ Text in Aitchen K. Wu: *China and the Soviet Union*. 1950. Appendix p. 415, quoted from Pompe 1953, p. 35. The latter considers the notion of war in general international law as a 'generally abandoned notion'.

¹²⁴ Sir Austen Chamberlain once said that to define aggression was more likely to provide an intending aggressor with a signpost than with a warning. Cf. J.L. Briery: *The Covenant and the Charter*. BYB 1946, p. 87. Anyhow, aggression differs from aggressive war only insofar as it is a different state of the same process, i.e., aggressive war is aggression answered. Bourquin RdC 1934/III, p. 60, rightly points out that "la réaction sociale qui se déclenche à la suite d'une agression consommée impose à ceux qui y participent la lourde obligation de s'immiscer dans une guerre."

¹²⁵ Resolution 378 (V) of November 17, 1950.

¹²⁶ See the original Yugoslav draft resolution A/C 1/604, of October 30, 1950.

Whether a war be lawful, or aggressive and therefore unlawful under International Law, is and can be determined only from a consideration of the factors that entered into its initiation. In the intent and purpose for which it is planned, prepared, initiated and waged is to be found its lawfulness or unlawfulness.¹²⁷

What makes the essential difference between the notion of 'aggressive war' in international penal law and the concept of 'war of aggression' in general international law is that the latter relies exclusively on the material existence of war, i.e., on war as a bilateral concept.

SECTION 3. CHALLENGES TO THE BINDING FORCE OF THE "JUS IN BELLO".

*Paragraph 1. The plea of necessity in time of peace and in time of war.*¹²⁸

The *jus necessitatis* has been introduced into international law by way of analogy from municipal law. In its broad sense, the *jus necessitatis* in municipal law denotes the right of a person to defence by means not normally permitted by laws. This defence of necessity must be resorted to for his own protection against an imminent danger under conditions which the law prescribes.¹²⁹ It is Grotius who probably first dealt with

¹²⁷ I.M.T.; A.D. 1948, No. 119, p. 379. With regard to the German allegations concerning the impending Allied invasion of Norway, Sir Hartley Shawcross made the following statement before the Nuremberg Military Tribunal:

"Aggressive war is none the less aggressive war because the State which wages it believes, rightly or wrongly, that other States might, in the future, take similar action. The rape of a nation is not justified because it is thought she may be raped by another. Nor even in self-defence are warlike measures justified except after all means of mediation have been tried and failed, and force is actually being exercised against the State concerned." I.M.T. (blue series), vol. III, p. 129.

¹²⁸ For a concise analysis of the problems involved, cf. M. Huber: *Die kriegsrechtlichen Verträge und die Kriegsrason*. VII, ZfV, 1913, pp. 351ff; P. Weiden: *Necessity in International Law*. Grotius Transactions 1938, pp. 105ff; B.C. Rodick: *The Doctrine of Necessity in International Law*. 1928; Glanville Williams: *The Defence of Necessity*. CLP 1953, pp. 216ff; Bin Cheng: *General Principles of Law*. 1953, pp. 69ff.

¹²⁹ The *jus necessitatis* is called in Anglo-Saxon countries the 'right of necessity' or 'defence of necessity'. In France it is a creation of the courts (*l'état de nécessité*), while in Germany (*Notstand*), Switzerland and Italy (*lo stato di necessità*), it has been sanctioned by the written law. Cheng 1953, p. 69, n. 3. See Williams CLP 1953, pp. 223/27.

In the Krupp trial the International Military Tribunal made the following statement: "The defence of necessity in municipal law is variously termed as 'necessity', 'compulsion', 'force and compulsion', and 'coercion and compulsory duress'. Usually, it has arisen out of coercion on the part of an individual or a group of individuals rather than that exercised by a government.

The Anglo-American rule as deduced from modern authorities has been stated in this manner: 'Necessity is a defence when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil.' A.D. 1948, No. 214.

the problem of necessity in its special relationship to international law. In basing his discussion on classic and post-classic Roman law as well as on moral, Grotius had no difficulty in transferring the principle of necessity to the province of international law where it was said to create a genuine right and not a mere excuse.¹³⁰

Necessity in time of peace: In practice, the plea of necessity has been invoked for acts of coercion committed in time of peace which were not liable to interpretation of 'acts of war' as well as in defence of acts which could make a *casus belli*.¹³¹ There is little doubt that necessity in the laws of peace "may excuse the non-observance of international obligations".¹³² The general outline for the right of necessity in time of peace can be found in the case of *The Neptune* in which it was declared that

the necessity which can be admitted to supersede all laws and to dissolve the distinctions of property and right must be absolute and irresistible, and we cannot, until all other means of self-preservation shall have been exhausted, justify by the plea of necessity the seizure and application to our own use of that which belongs to others.¹³³

In general, the right of necessity is said to flow from the principle of self-preservation in international law.¹³⁴ In law, however, the defence of necessity is not identical with that of self-defence.

¹³⁰ Weiden 1938, pp. 113/14, who gives at p. 114 a narrative of the doctrine of necessity in classic international law. Cf. S. Glaser: *Quelques remarques sur l'état de nécessité en droit international*. *Revue de droit et de criminologie*, 1952, pp. 570ff. at pp. 576/78.

¹³¹ The judgments which Lord Stowell rendered in *The Christiansberg* Rob. Adm. Rep. 376, 378, I and *The Gratitude* III, Rob. Adm. Rep. 240, 266 dealt with necessity in time of peace. Cf. Weiden 1938, p. 120. The unilateral abrogation of the Paris Treaty by Russia in 1871 was equally attempted to be defended on grounds of necessity in time of peace. Cf. Glaser 1952, p. 578.

In international law the distinction between necessity in time of peace and necessity in time of war is not contradicted by the fact that the plea of necessity in time of peace very often has been invoked in defence of warlike acts.

¹³² Individual opinion of Judge Anzilotti in the *Oscar Chinn Case*, PCIJ, A/B. 63, p. 113.

¹³³ Quoted from Cheng 1953, p. 70, who continues in giving a general analysis of the rules determining the plea of necessity. For further State and court practice see Rodick 1928, pp. 26ff.

¹³⁴ There has been sometimes invoked the term 'necessity in self-preservation' rather as subterfuge than as genuine right. In general this term was used in defence of acts of war against neutrals. N.C. Dunbar: *Military Necessity in War Crime Trials*. BYB 1952, p. 443, points out that the term 'necessity in self-preservation' was used to "justify acts of a hostile nature carried out by the state primarily as matter of military expediency in time of war against the subjects or property of another state. The shelling of Copenhagen and the seizure of the Danish fleet in 1807 by British naval forces, the violation in August 1914 of Belgian and Luxembourg neutrality by Germany, the sinking in July 1940 of a substantial part of the French fleet in the port of Oran, are instances of belligerent action pursued under the guise of necessity in self-preservation."

The principal distinction lies in the legal principle involved. Self-defence excuses the repulse of a wrong whereas the rule of necessity justifies the invasion of a right.¹³⁵

Necessity in time of war: Necessity in the law of war has been dealt with under three different aspects: (1) As a plea for preventive action in the field of strategy generally branded by the German proverb: "Kriegsraison geht vor Kriegsmanier"; (2) by the abortive attempts to interpret necessity as a means of 'self-defence', which in fact amounts to forestalling imminent danger from the enemy by extending the theatre of war to neutral countries; (3) as a right to disregard the binding force of the rules of warfare between the belligerent parties, commonly called the right of military necessity. Necessity in these three fields, strategy, neutrality, and war *stricto sensu* is characterized by the common fact that it deals with illegal acts which are said to be justified by emergency. Very often any such illegal acts have not only been justified by necessity but in addition defended as 'self-defence against an enemy's illegal act' or as reprisal.¹³⁶

Any theoretical discussion of the right of necessity must be influenced by State practice.¹³⁷ The legal doctrines on this topic have been rather confusing in the past because of their tendency to examine the plea of necessity *de lege ferenda* in the light of the German pretense: "Not kennt kein Gebot" (necessity knows no law). As a consequence, the plea of necessity is nowadays suspected to have been "made in Germany" and hardly to be recognized either by authorities *d'outre Rhin* or by Anglo-American writers. Any condemnation *grosso modo*, however, of the right of necessity as a German invention ignores the different roles which the former has been recognized to play in cases of individual necessity, of State emergency and of military necessity.

¹³⁵ I.M.T. Krupp trial, A.D. 1948, No. 214, p. 630. Cf. J. Kunz: *Individual and Collective Self-Defence in Art. 51 of the Charter of the United Nations*. AJIL 1947, p. 876.

¹³⁶ In the two post World War I decisions of the Supreme Court of Germany, for instance, in which the term *Notstand* is discussed, i.e., the right of necessity, the Court was probably only concerned with the right of defence against illegal attack. See A.D. 1919/22, case No. 126, A.D. 1923/24, case No. 130: During World War I the German occupation authorities in Belgium requisitioned a motor belonging to a Belgian manufacturer and sold it to the defendant. It was to be decided whether the defendant obtained full and uncontested property, in spite of Art. 52 of the Hague Convention IV which permits requisition in kind "only for the purpose of the army of occupation". It was held that as a result of the *Hunger Blockade*, an illegal act of the enemy, Germany was put in a position in which she had, as a matter of necessity, to adopt measures of an unusual nature. Both decisions contain *dicta* of a very sweeping character, according to which a mere "Notstand" may overrule the law of the Hague Conventions. Weiden 1938, p. 112, declares with regard to these two decisions that "these *dicta* are, however, without any modification based on a generally recognized rule of International Law, and it may be assumed that by "a right of self-defence against an illegal attack" a reprisal is referred to."

¹³⁷ A distinction in State practice with regard to 'necessity' is to be drawn according to whether its application was territorial or external.

An examination of all that has so far been said in doctrine under the headings of *Kriegsraison geht vor Kriegsmanier* or *Not kennt kein Gebot* will be of any use only if account is taken of the fact that the discussions on these two pretenses deal indiscriminately with State necessity and military necessity.¹³⁸ As to the former, it had indeed been strongly supported by German writers in the course of the 19th century, but it also had its precedences in State and court practice of other countries until the end of World War I.¹³⁹ Its final condemnation, however, has been emphatically reaffirmed by the Nuremberg Military Tribunal which argued that point on grounds of the outlawry of war. It was laid down as a rule that the plea of State necessity in time of war is never available to an aggressor as a matter of international law "in view of the prior violation of that law":

He who initiates aggressive war loses the right to claim self-defence against those who seek to enforce the Treaty.¹⁴⁰

This repudiation concerns merely the doctrine of State necessity or State emergency in time of war, even in the event that State emergency is argued on grounds of military necessity.

It is an essence of war that one or the other side must lose and the experienced generals and statesmen knew this when they drafted

¹³⁸ E.T. Hazan: *L'Etat de Nécessité en Droit Pénal Interétatique et International*. 1949, p. 58, like most of the doctrinists on this subject, lacks this fundamental distinction when he resumes the 'German Doctrine' as follows:

"Selon la doctrine allemande, il y a deux façons légitimes de faire la guerre, la manière ordinaire ou 'Kriegsmanier', qui oblige à observer et à respecter les règles formulées par le droit des gens, et la manière exceptionnelle ou 'Kriegsraison' suivant laquelle on peut déroger à ces règles. C'est le cas où on est en présence des circonstances exceptionnelles dans lesquelles le simple emploi de la 'Kriegsmanier' ne suffirait pas. Alors le principe de la raison de guerre permet de rejeter toutes les entraves que le droit des gens a mises à son action. Avec la raison de guerre tout est permis. Il s'agit d'arriver à la victoire à tout prix."

To the same effect de Visscher RGDIP 1917, pp. 96/97. For an exact analysis of the German theory with regard to writers such as Strupp, Liszt, *et. al.*, and its limited application by German court and State practice, see Weiden 1938, pp. 110ff; Wheaton-Keith: *Wheaton's International Law*. 7th ed., 1944, vol. II, pp. 169ff, 203; L. Duguit: *La doctrine allemande de l'auto-limitation*. *Revue de droit public et de la science politique*, 1919, p. 188; Ch. de Visscher: *Les lois de la guerre et la théorie de la nécessité*. RGDIP 1917, p. 79. For a very pertinent historical and legal analysis of the German doctrine, cf. Weiden 1938, pp. 106ff. Cf. A.L. Goodhart: *What Acts of War are justifiable?* 1940, pp. 10ff.

¹³⁹ In his first edition, Westlake: *International Law*. 1904, p. 302, discussed the case of a belligerent "having sure information that the enemy in order to obtain a strategic advantage is about to march an army across the territory of a neutral State too weak to resist. In these circumstances it would be impossible to deny him the right of anticipating the blow on neutral territory." The seizure of the Danish fleet was, in his view, legal.

¹⁴⁰ I.M.T. (Protocols) Weizäcker Trial, 28 104 and 28 105 and Heinze-Schilling 1952, No. 582.

the rules and customs of land warfare. In short these rules and customs of land warfare are designed specifically for all phases of war.

They comprise the law for such emergency. To claim that they can be wantonly — and at the sole discretion of any one belligerent — disregarded when he considers his own situation to be critical, means nothing more or less than to abrogate the laws and customs of war entirely.¹⁴¹

Besides military necessity which States are prevented from invoking on grounds of State emergency, there remains the genuine concept of tactical military necessity as a plight of a single military unit.¹⁴² The latter has acquired a place of its own in international law. Tactical military necessity which prevails in the fight of a military unit cannot be explained in a general way because of its being individually settled with regard to each of the rules of warfare.

Summary: Viewed in the light of *war in the material and formal senses*, the legal thought about necessity in the province of international law is determined by the following items:

(1) As a rule, any pretence of an all-embracing legal instrument called 'necessity' which derives its scope of application from the principle of self-preservation has been precluded from the province of international law by virtue of the outlawry of war.

(2) The exceptions to this rule are comprehensible only in relation to the concept of war in the material and formal senses which upholds the dichotomy of peace and war but traces new bounds between peace and war.¹⁴³ As a consequence the exceptions to the preclusion of necessity in international law must be examined differently according to whether necessity in time of peace or necessity in time of war is concerned.

¹⁴¹ Krupp trial, A.D. 1948, No. 214, p. 628; cf. Glaser 1952, p. 599.

¹⁴² On the one hand Huber VII, ZfV, 1913, p. 370, rightly pointed out that "in der Diskussion über die militärische Notwendigkeit, Kriegsraison, nécessités de guerre usw. zwei wesentlich verschiedene Dinge vermischt werden: Das Vorgehen des militärischen Interesses vor dem nichtmilitärischen bei Konkurrenz beider und das Abweichen von einer positiven Vorschrift aus Gründen militärischer Natur." On the other hand, that author failed to mark the important difference of military necessity as a pretended right of a State (in its entirety as a political unit), i.e., strategical military necessity, and military necessity in the fight of a military unit, i.e., tactical military necessity.

¹⁴³ One of the border cases between strategical military necessity and tactical military necessity may be found in *The Zamora* where it was held that a belligerent Power has by international law the right to the use of vessels or goods, which are in the custody of its Prize Courts, if an urgent necessity is proved. "This right is, however, limited to cases in which a real issue has to be tried and the Prize Court has to decide judicially whether it can be exercised." Weiden 1939, p. 120. The court cited with approval the case of *The Curlew* (Stewart's Vice Adm. C. Nova Scotia, p. 312), in which it was held that the possession of arms, ships and provisions may, before adjudication, be given to a belligerent Government in extreme necessity. It appears that the right of angary is indeed an exception to the non-invocation of State emergency in time of war, i.e., the preclusion of strategical military necessity.

(3) As to necessity in time of war a distinction must be drawn between State necessity or State emergency which is generally argued on grounds of strategical military necessity and military necessity *stricto sensu* which is tactical, i.e., arguable only for the needs of fights and combats. Strategical military necessity in both formal and material wars does not entitle the State to disregard the laws of war.

(4) Military necessity *stricto sensu*, which is comprised in each of the rules of warfare, characterizes itself as a reference to the province of military science. The needs of tactical military operations have been thereby taken into account by international law and admitted to determine the extent and mode of violence. Military necessity cannot be invoked for disregard of the rules of war for the sake of convenience or strategical interest.¹⁴⁴ The rightness of every case of military necessity is liable of being submitted to adjudication and thereby a matter to be determined in the last resort by the lawyer and not by the soldier.¹⁴⁵

Paragraph 2. The argument of "ex injuria jus non oritur".

The autonomy of the modern *jus in bello* in its relation to the *jus ad bellum* has been recognized in the course of the 19th century. Any application to the actual conduct of war of the principle *ex injuria jus non oritur* would necessarily transform the armed contest into a struggle which was no longer subject to any regulation or limitation whatsoever. As a result, even those of the laws of war which are of humanitarian character, would be abandoned. These guiding considerations which led up to the independency of the *jus in bello* prevented international law from drawing all the conclusions of the well-established principle *ex injuria jus non oritur*. As far as the application of the rules of warfare is concerned, that principle yields to the rival principle *ex factis jus oritur*.¹⁴⁶ This legal thought has been reaffirmed in the proceedings of the International Military Tribunal at Nuremberg which declared that

¹⁴⁴ As an example, the *Rauter case* may be invoked where the defendant pleaded unsuccessfully that the deportation of Dutch students to Germany during World War II was a military necessity seeing that they belonged to those classes of the population liable to be conscripted for service in the Dutch resistance movement, and that a landing of Allied forces in the Netherlands was considered imminent. Cf. Dunbar BYB 1952, p. 445.

¹⁴⁵ As it was expressed in the *Beni-Madan, Rzini Claim* (Spanish-Anglo Arbitration, 1925 quoted in L.C. Green: *International Law through the Cases*. 1951, pp. 658 ff.), courts, in finding upon military necessity, will get guidance from "those persons who are called upon to act in difficult situations, as well as to their military chiefs."

See also *Mitchell v. Harmony*, 13 How. 115 (1851) quoted in Downey AJIL 1953, p. 256. In the *Hostage trial* the court declared: "It is apparent from the evidence of these defendants that they considered military necessity, a matter to be determined by them, a complete justification of their acts. We do not concur in the view..." A.D. 1948, Case No. 215.

¹⁴⁶ Lauterpacht BYB 1953, p. 212. As another example to the same effect, that author invokes the vicissitudes of the doctrine of non-recognition which consists essentially of the application of the principle *ex injuria jus non oritur*.

whatever may be the cause of a war that has broken out, and whether or not the cause be a so-called just cause, the same rules of International Law are valid as to what must not be done, may be done, and must be done by the belligerents and neutral States. This is so, even if the declaration of war is *ipso facto* a violation of International Laws as when a belligerent declares war upon a neutral State for refusing passage to its troops, or when a State goes to war in patent violation of its obligations under the Covenant of the League or the General Treaty for Renunciation of war.¹⁴⁷

This indictment of the Nuremberg Tribunal which only restates the law, firmly rejected the plea of the prosecution which went to the opposite effect.¹⁴⁸ Ever since that opposite effect has been maintained by a few national court decisions¹⁴⁹ and by some writers in international law, all of which,¹⁵⁰ however, could not change the law. Moreover, the

¹⁴⁷ I.M.T. *Hostage trial*. Quoted from Oppenheim-Lauterpacht IntL 6th ed., vol. II, p. 174. In the era of the League of Nations this principle had been laid down in the decision of the Committee for the Amendment of the Covenant of the League of Nations in order to bring it into harmony with the Pact of Paris, Minutes, C. 160. M. 69, 1930 V. To the same effect after World War II, Mosler 1948, p. 345; Stödter 1948, pp. 105, 107; A. Ross: *Denmark's legal status during occupation*. Acta Scandinavica 1949, pp. 1ff; Kunz: *The Chaotic Status of the Law of War and the Urgent Necessity for their Revision*. AJIL 1951, p. 45; R. Baxter: *Constitutional Forms and Some Legal Problems of International Military Command*. BYB 1952, p. 358; Ch. Rousseau: *Droit international public*. 1953, p. 540; W. Sauer: *System des Völkerrechts*. 1952, p. 286; Castrén 1954, p. 58; Stone 1954, p. 316; H. Brandweiner: *Sind die Vereinigten Nationen den Kriegsgesetzen unterworfen?* Neue Justiz, 1954, pp. 225/26; Schätzel, Acta Scandinavica 1954, p. 30; Q. Wright: *The Outlawry of War and the Laws of War*. AJIL 1953, p. 373. Cf. BYB 1953, p. 215. In the case of General Christiansen the court declared that it had "to accept that imperfect state as existing law". A.D., 1948, No. 121. See *General Devastation Case* (Germany), A.D., 1948, No. 124, *In re Garbe*, A.D., 1948, No. 125 and *In re Latza*, Archiv VR, 1948, p. 120, 1950, p. 491.

¹⁴⁸ Sir Harley Shawcross, in his closing speech before the International Military Tribunal, declared that "the killing of combatants in war is justifiable, both in international and national law, only where the war is legal. But where the war is illegal... there is nothing to justify the killing, and these murders are not to be distinguished from those of any other lawless robber band". Cf. Lauterpacht BYB 1953, p. 216, n. 4. This standpoint had been offered immediately after World War I in BYB, 1920/21, p. 124 and was sustained by J. Ray: *Commentaire du Pacte de la Société des Nations* 1930, p. 528, Politis and Rolin, the arguments of whom are refuted by H. de La Pradelle: *Utopie ou Calcul; Négligera-t-on longtemps encore l'étude des lois de la guerre?* RDI 1933, p. 516. Wehberg 1931, pp. 83/84 held the view that "the old rules of the law of warfare" could claim only a moral force.

¹⁴⁹ Cf. the Luxembourg trials on war crimes *In re Werner*, June 16, 1948 and *In re Hemmerling*, July 28, 1949; reported in Archiv VR, 1949, pp. 233 and 494. To a similar effect, the Dutch court decision of the first instance in the *Rauter case* A.D., 1948, No. 131. See also the Dutch Special Court in the *Zuhke case* A.D., 1948, p. 416.

¹⁵⁰ Van Nispen tot Sevenar: *L'occupation allemande pendant la dernière guerre mondiale*. 1946, pp. 287/88; P.C. Jessup: *A Modern Law of Nations*. 1948, pp. 188ff; G. Scelle: *Quelques réflexions sur l'abolition de la compétence de guerre*. RGDIP 1954, p. 19.

practice of the United Nations enforcement measures failed to apply the maxim of *ex injuria jus non oritur* whenever the laws of warfare were concerned.¹⁵¹

Paragraph 3. The abolition of the "jus in bello" is said to be due to the concept of total war.

The idea of 'total war' has grown out of a premise in the field of military philosophy about war taught by Clausewitz and derived from the features of Revolutionary-Napoleonic practice.¹⁵² Reasoning in the abstract, Clausewitz started out from the striking premise that "to introduce into philosophy of war a principle of moderation would be absurd. War is an act of violence pursued to the utmost". The purely philosophical content of this maxim, however, was marked by that metaphysically minded soldier himself: "But everything takes a different shape when we pass from abstractions to reality."¹⁵³

The idea of unlimited effort was hitched on to that of unlimited aim — of absolute victory. Here, likewise, Clausewitz's disciples were led astray by his argument that in theory, the complete disarming or overthrow of the enemy must always be the aim of warfare'. Struck by its logical simplicity, they converted a theoretical point into a dogma. They failed to note his qualifying comment that such absolute victory 'is rarely attained in practice and is not a condition necessary for peace'.¹⁵⁴

The military doctrine of 'absolute war' remained legally without concern as long as States, by their political structure, prevented its literal application in international conflicts. In the American Civil War, which in many ways can be regarded as the prototype of modern 'total war', its realization was sought to be justified on the ground of preserving the Union.¹⁵⁵ It is only with the rise of totalitarian States that this philosophical military conception has been given a sociological con-

¹⁵¹ Kunz AJIL, 1951, p. 60, observes that "the envisaged prohibition of the use of the atomic bomb pertains to the rules of war and shows that even in the United Nations large-scale fighting, whether legal or illegal, is considered possible". It goes without saying that the above referred exception to the principles of *ex injuria jus non oritur* concerns both material and formal wars.

¹⁵² For a brief survey on this issue see Liddell Hart: *The Revolution in Warfare*. 1946, pp. 54/57.

¹⁵³ In Liddell Hart 1946, p. 55.

¹⁵⁴ *Ibid.* p. 55. Cf. F. Foch: *Des principes de la guerre*. 1926, Préface.

¹⁵⁵ Liddell Hart, 1946, p. 58, remarks that "the devastation of Georgia by Sherman, and of the Shenandoah Valley by Sheridan, were designed to undermine the resistance of the Confederate armies by destroying their homes, as well as their sources of supply. These 'anti-civil' operations proved more effective than Marlborough's devastation of Bavaria, for they were decisive in producing the collapse of the Confederacy. The end appeared to justify Sheridan's argument for the means: 'Reduction to poverty brings prayers for peace more surely and more quickly than does the destruction of human life, as the selfishness of man has demonstrated in more than one great conflict'."

notation and introduced as such in the province politics.¹⁵⁶ The idea of total war being justified by ideological principles could not then do without indoctrinating each belligerent with a deadly hatred of the enemy, without "making the enemy infamous down to the roots of his national, historical and cultural character and history".¹⁵⁷

Total war, in its modern form, has become the combination of totalitarian conduct of public opinion with a technological progress in arms. It is against this background that international law had to take into consideration any eventual legal impacts which might have been brought about by resort to total war.¹⁵⁸ The issue at stake has been examined in legal theory under two different aspects:

(1) Total war being the outcome of the predominance of the Anglo-Saxon concept of war in international law;

(2) as the inevitable conduct of warfare in armed conflicts which are fought out on a world-wide scale.

Both approaches characterize themselves, in the last analysis, as challenges to the binding force of the *jus in bello*.

Total war in the first sense is argued on the ground that the Anglo-Saxon definition of the enemy has, since World War I, taken precedence over Rousseau's concept of 'war being a conflict between States'.¹⁵⁹ Corroboration of this assertion is found in the fact that the right of blockade, the establishment of which had been brought out in the 19th century as a compromise between the Anglo-Saxon and the continental practice of warfare, was abandoned in favour of an unlimited 'economic warfare'. Not only was the traditional blockade changed into a long distance blockade, but the conduct of warfare was directed against all means of communication, both visible and invisible.¹⁶⁰ In addition, the respect of neutral rights was reduced to a 'benevolent' concession on the part of the belligerents. These facts are considered to make up the

¹⁵⁶ "La guerra total, como existe hoy, no es una consecuencia de los regimenes totalitarios: es el resultado de la combinaci3n del progreso tecnico en las armas y un cambio en la manera de conducir la guerra." L. P. Garcia: *La poblaci3n civil y la guerra aerea moderna*. REDI 1953, p. 338. Reference is made to J.M. Castro Rial: *La guerra total*. Revista de Estudios Juridicos, pp. 605ff.

¹⁵⁷ Kunz AJIL 1951, p. 41.

¹⁵⁸ P.C. Jessup: *Intermediacy*. Acta Scandinavica, 1953, p. 24, already held that current usage requires a terminology distinguishing between 'war' and 'total war' which "is in itself significant and bears testimony to the terrible potentialities of war in the atomic age." A recognition of a state of intermediacy might, according to this author, diminish the likelihood of the outbreak of 'total war' between the United States and the USSR. See also Stone 1954, pp. 338ff; C. Schmitt: *Totaler Feind, totaler Krieg, totaler Staat*. In *Positionen und Begriffe*. 1940, pp. 235ff; Spaight 1947, p. 32.

¹⁵⁹ A. Waltz: *Nationalboykott und V3lkerrecht* 1939, p. 111: "Der Einsatz des Wirtschaftskrieges im Kriegsfall in Widerspruch mit der klassisch-kontinentalen Kriegsauffassung hat die entscheidende Wendung zum totalen Krieg gebracht..." Cf. Mayer 1935, p. 44.

¹⁶⁰ H. Bourgau: *Guerre et blocus*, 1937, p. 577; Smith 1947, pp. 58 ff., 74.

new 'law of total war'.¹⁶¹ Yet in the course of World Wars I and II, neither of the belligerents justified such a belligerency by total war. Instead, they justified all these acts on grounds of reprisals for redressing unlawful acts. The reluctance of States to recognize 'total war' as a plea for disregard of the laws of warfare did not prevent them from regarding 'total economic warfare' as possibly being recognized in the province of the laws of war. Total economic warfare signifies the extension to a nation-wide scale of the right to reduce a besieged place by starvation. It remains doubtful, however, whether the attempt of starvation by blockade of the whole enemy population can any longer be considered as illegal under international law.¹⁶² At any rate, the admission of total war in the sense of total economic warfare may create an exception to, but was never intended to abolish the general distinction between combatants and non-combatants. Neither does any such admission entitle the disregarding of the *jus in bello* concerning military operations *stricto sensu*.¹⁶³

As to the second plea, which means the introduction of the sociological conception of 'total war' as a ground for complete disregard of the laws of war in the province of international law, it has so far been met with strong opposition.¹⁶⁴ The International Military Tribunal committed itself on this issue in the I.G. Farben trial:

It is further said that the Hague Regulations are outmoded by the concept of total warfare, that literal application of the laws and customs of war as codified in the Hague Regulations is no longer possible... These contentions are unsound. It is obvious that acceptance of these arguments would set at naught any rule of international law and would place within the power of each nation to be the exclusive judge of the applicability of international law...

¹⁶¹ A. Vaudaux: *Blockade und Gegenblockade*. 1948, p. 17.

¹⁶² See H.A. Smith 1948, pp. 67, 128; W.L. Rodgers: *Future International Laws of War*. AJIL 1939, p. 449 states: "It has always been the rule that cities might be brought to surrender both by beleaguering and consequent starvation as well as by bombardment and bloodshed. In the last war the Central Powers were in the end brought to terms by the policy of beleaguering whose effects fell on the whole population, as well as on the troops defending the nation."

¹⁶³ Smith 1947, p. 76 and *Modern Weapons and Modern War*. World Affairs, 1955, p. 107, who is in favour of the theory of total war, nevertheless recognizes that the distinction between combatants and non-combatants was sound in principle "and it is still valid today, whenever the facts enable it to be drawn." As to total economic warfare and neutrality, Guggenheim takes an analogous stand. *Traité* 1954, pp. 386/88. Kulski AS Proceeding 1949, pp. 124/26 drew a distinction between rules of war which are compatible with total war, and rules concerning combat operations which are not. Cf. Kunz, AJIL 1951, p. 57.

¹⁶⁴ G.F. Kennan: *Is War with Russia Inevitable?* Readers Digest LVI No. 335, 1950, pp. 1ff. points out that war remains an extension of politics by other means and that war need not be total. Cf. C.W. Tinch: *Quasi-War between Japan and the USSR 1937-1939*. World Politics 1951/III, p. 174. See also F. Dehousse in La Pradelle, 1936, p. 133; Rousseau 1953, pp. 540/41.

It must be admitted that there exist many areas of grave uncertainty concerning the laws and customs of war... Technical advancement in the weapons and tactics used in the actual waging of war may have made obsolete, in some respects, or may have rendered inapplicable, some of the provisions of the Hague Regulations having to do with the actual conduct of hostilities and what is considered legitimate warfare. But these uncertainties relate principally to military and naval operations proper and the manner in which they shall be conducted.¹⁶⁵

¹⁶⁵ A.D., 1948, No. 218, p. 677. Cf. Guggenheim SJIR 1945, p. 46. Kunz AJIL 1951, p. 60, is backed up by very many authorities when he deals with the arguments "of the fatalistic pessimists who resign themselves to total war, because 'laws of war, as to combat, are incompatible with total war'... The real problem is not whether such laws of war are incompatible with total war, but whether total war is compatible with the survival of human culture." If the latter is to be affirmatively answered, and we think it is, it follows that lawyers might be called upon again to pronounce themselves on the legality or illegality of certain acts of war. For such a purpose they badly need a revised law of war. Cf. Spaight, 1947, p. 46.

CHAPTER V

THE MODERN CONCEPT OF WAR HAS BEEN DEVELOPED ALONG TWO LINES: NEUTRALITY AND ARMED REPRISALS.

In legal doctrine as well as in State practice the soundness of the orthodox concept of war has been increasingly challenged each time the unrestricted application of the laws of neutrality was contested by either of the belligerent parties. So far the question of 'War or No War' had been dependent upon a declaration of war or any equivalent manifestation of *animus belligerendi*. Yet towards the end of the 19th century attempts were made in State practice to deny on the one hand any intention of waging war but on the other hand to claim the exercise of belligerent rights with regard to third powers. The doctrinal, diplomatic and legal controversies which dealt with any of these instances very early relied on the respect of neutrality as a *conditio sine qua non* for the determination of a state of war. Later on the statute of neutrality was made a criterion for the existence of a formal state of war, notwithstanding the fact that a material war, which did not comprise the statute of neutrality, might also produce some limited effects in international law.

Evidence will be given by an investigation into the history of neutrality that war was originally conceived as material war, which knew nothing of laws of neutrality. When, however, the statute of neutrality was generally recognized in the *jus gentium*, the concept of war changed its meaning and was determined by the *animus belligerendi* of the belligerent parties and the status of neutrality with regard to third powers. It is indeed a comparatively modern notion of war that neutrals have rights against belligerents, who are under corresponding duties to neutrals. Since the creation of a system of collective security, however, that notion became insufficient and was completed by the concept of material war which did not imply the status of neutrality.

The legal development of armed reprisals constitutes another instance which urged the recognition of material war in the province of international law. Owing to this evolution there are nowadays three different legal forms which may determine the character of international armed conflicts: Formal war, material war and force short of war.

SECTION 1. NEUTRALITY AND THE CONCEPT OF WAR.

*Paragraph 1. The development of a legal status of neutrality affected the concept of war.*¹

Since the Middle Ages the notion of neutrality has developed from its original character of a political concept into that of a legal status under international law.² The term 'neutral' and 'neutrality' dates back as far as the 14th century, where it is to be encountered in diplomatic correspondence and in treaty stipulations.³ The word was then used in the sense of non-participation in an armed conflict between princes and is synonymous with '*stille sitzen*'.⁴ The exact meaning of neutrality as a political concept is discernable only with regard to the fact that the Middle Ages did not know any legally drawn distinction between peace and war such as exists today. War, especially on the sea, degenerated very often into a kind of warfare which was very similar to a *bellum omnium contra omnes*. The original political function of neutrality consisted in tracing the line between war as it concerned the belligerents, and peace as it concerned the relations between a belligerent and a third prince, who deliberately meant to remain out of any such war. Neutrality, with regard to this original political sense, is supposed to have originated out of the field of maritime law.⁵

The first set of rules of warfare taking into account the delimitation between peace and war consisted in the *consolato del mare*.⁶ Since about 1370, these rules, which had been developed by custom, recognized a differential treatment of friend's goods and enemy goods with regard to confiscation in armed conflicts. So far as the term 'neutral' is employed, it is synonymous with 'friend'; it is understood that the latter does not partake at all in the war.

¹ For basic studies see J. Haase: *Wandlung des Neutralitätsbegriffes*. 1932; Jessup and Déak: *Neutrality. Its History, Economics and Law*. Vol. I: *The Origins*. 1935. See also F.J. Holtzendorff: *Handbuch des Völkerrechts*. 1885ff. vol. IV, pp. 616ff; P. Einicke: *Rechte und Pflichten der neutralen Mächte im Seekriege nach dem Haager Abkommen vom. 18 Oktober 1907*. 1912; Ch. Calvo: *Le droit international théorique et pratique*. 5^e éd., vol. IV, pp. 407 ff; Eagleton 1948, pp. 401 ff; Castrén: *Neutralität*. ArchivVR 1955, pp. 23 ff.

² Haase 1932, observes that neutrality as a legal notion was unknown in the Middle Ages.

³ Cf. Jessup and Déak 1935, pp. 4, 20; Haase 1932, pp. 4/5; Wehberg 1915, p. 17; Einicke 1912, p. 19. For an account of the etymological development of the word 'neutral' see Nys: *Etudes de droit international et de droit politique* 1901, pp. 57/58.

⁴ Nys 1901, p. 58, finds the word used in the sense of non-participation in a war as early as 1378 and traces its first use in an official document back to the French king's decree of May 25, 1408. A treaty to such an effect, however, had already been concluded in 1303 by England and France.

⁵ Rousseau 1953, p. 672; Haase 1932, p. 6: "Als Ausgangspunkt für die Entwicklung der Neutralität haben die Mittelmeerländer zu gelten. Gerade dort und gerade in Seekriegsrecht begannen sich Grundsätze über die Neutralität auszubilden... Diese Entwicklung hatte ihren Grund darin, dass von den Mittelmeerländern der Handel nach dem Osten, insbesondere nach Indien, geführt wurde."

⁶ See Jessup and Déak, 1935, pp. 124ff.

Concerning the case of enemy goods in friends' (neutral) ships, the *Consolato* provides that the goods are subject to confiscation though the vessel is not. On the other hand, friends' goods on enemy ships were not *ipso facto* subject to confiscation, though the ship was.⁷

An evaluation of 'neutrality' in the light of the conditions and practices of that era shows that it was meant to delimitate peace from war. The *jus gentium* of the Middle Ages was concerned exclusively with war in the material sense. Belligerents were held to be at war with one another and at peace with those friendly (neutral) sovereigns who were manifestly determined to keep out of the hostilities.⁸

The modification of 'neutrality' as a political concept of abstention from war operations into "neutrality" as a legal status had to wait upon the emergence of the Modern State. If neutrality had been so long a concession on the part of the belligerents, the maxim of reciprocity developed it equally into a concession of the part of neutrals towards belligerents.

Neutrality, as a legal status, is particularly dependent upon the preexistence of a society of nations. Prior to the seventeenth century we find the word used and we find adumbrations of many rules which later came to govern the rights and duties of neutrals and belligerents.⁹

By and large, it can be said that the concept of neutrality started to take shape as a legal status in international law after the Peace of Westphalia in 1648.¹⁰ With the opening of the 18th century it comprised a series of rights and duties which were incumbent upon the State.¹¹ The 'imputability' to the State of these rights and duties is

⁷ Jessup and Déak 1935, p. 125. See also Calvo, *op. cit.* vol. IV, p. 412; Nys 1901, p. 66.

⁸ Haase 1932, p. 3: "Grundsätzlich kann gesagt werden, dass die Frage, wie sich ein Drittstaat zu den Kriegsparteien stellen sollte, der politischen Erwägung anheimgegeben war und nicht der Beurteilung des Rechtes unterlag." Haase refers to *Il Principe di Niccolo dei Machiavelli*, Cap. XXI: "Como si detta governare un Principe per aquistarsi riputazione."

Nys 1901, p. 65, rightly points out: "Mais... c'est du belligérant lui-même que venait la concession d'immunité au non-belligérant, et pour l'obtenir, il fallait, selon les expressions usitées, être *in treuga* ou *in pace*, il fallait rentrer dans la catégorie des *fideles*, des *treugati*, des *amici*. Dans cette terminologie, la 'paix', la trêve, l'amitié étaient comme synonymes de neutralité."

⁹ Jessup and Déak 1935, p. 4.

¹⁰ Cf. Brierly 1945, pp. 25ff.

¹¹ In legal science, the concept of neutrality seems to be dealt with for the first time in the works of Jean Bodin, 'Six livres de la république' and Neumayer von Ramsala 'Von der Neutralität und Assistenten in Kriegszeiten' which appeared in 1620. Grotius, in his 'De jure belli ac pacis', devoted only a short chapter (XVII 3) to neutrality under the headline *De his, qui in bello medii sunt*. He considered neutrality to be dependent on the concept of *bellum justum*. Bynkerhoek was no more explicit. He defined neutrality as *non hostes appello qui neutrarum partium sunt*. It is certainly Vattel who for the first time considered neutrality *per se* in its modern acceptance, yet even he is not quite free from the doctrine of *bellum justum*. Cf. Haase 1932, p. 4; Einicke 1912, p. 20; Nys 1901, p. 56.

henceforth the essential characteristic of the notion of neutrality. Whereas the political concept of neutrality in the *jus gentium* did not preclude sovereigns from allowing their subjects to privateer in foreign services, the legal status of neutrality in international law urged neutral States to prevent any such activities on the part of its subjects. The counterpart to this passive function of State supervision was that the neutral State was attributed the capacity of protecting actively its legal status of neutrality. The institution of 'Armed Neutrality', as proclaimed by Catherine in 1780 in accordance with the great European powers, was the direct result of this evolution.¹² The implication of this proclamation was that

the neutral opposed force to force and sought to secure the undisturbed passage of his merchantmen by the presence of an armed convoy prepared to sustain the truth of his certification by the strength of his cannon.¹³

The *jus gentium* had only been concerned with war in the material sense. The notion of neutrality, which was political, helped to delimitate the effects of war upon the peace. This was no longer true after the outgrowing of international law which elaborated three legal states: the state of peace, the state of war and the state of neutrality.¹⁴ The existence of war was no longer dependent upon the existence of an armed conflict, but rather, a state of war could be initiated by a declaration of war only. Accordingly, the concept of war underwent a change in its meaning in international law, as the latter became only concerned with war in the formal sense commonly called 'war in the sense of international law'. The concept of war in the formal sense paid due regard to the function of neutrality as a legal status besides that of peace and war.¹⁵ The rights and duties of neutrality as were

¹² Wehberg 1915, p. 31; Einicke 1912, pp. 5/8. Sir John Fischer Williams declared that "the Armed Neutrality of the 18th century was a proceeding by a small number of states to enforce as a rule of international law a principle which had not been accepted by the state against which action was to be directed." *Sanctions under the Covenant*. BYB 1936, p. 130.

¹³ Jessup and Déak 1935, p. 160.

¹⁴ A State may be both a belligerent and a neutral at the same time, although, of course, not with reference to the same war. Cf. Harvard Draft, AJIL 1939, Suppl. p. 211; Jessup-Déak 1935, pp. 82, 118.

While under the doctrine of *bellum justum* no third party could claim rights against a belligerent whose cause was just, the position was henceforth that not only may a State legitimately stand aside from a war, however just the cause may be of one side, but also that such a neutral State may claim to carry on as far as possible normal trade relations with all belligerents and all other States. Rowson BYB 1946, p. 347.

¹⁵ For a compilation of definitions see Haase 1932, p. 15, Calvo, IV, pp. 407/10. "Das heutige Neutralitätsrecht hat sich in der Staatenpraxis als Kompromiss zwischen widerstrebenden Interessen entwickelt. Als Beispiel für einen Punkt, in dem die geltenden Bestimmungen im Widerspruch zum reinen Neutralitätsbegriff stehen, seien die verschiedenen Zwangsmassnahmen der Kriegführenden gegen neutrales Vermögen erwähnt und ebenso das einem neutralen Staat zustehende Recht, Kriegsschiffen der kriegführenden Mächte die Einfahrt in seine Küstengewässer zu gestatten". Castrén ArchivVR 1955, p. 24.

codified in Hague Conventions V and XIII were conceived to be of binding force only with regard to war in the formal sense.¹⁶

Paragraph 2. The relationship between State practice with regard to 'pacific' blockade and the establishment of the concept of war in the formal and material senses.

1. *The historical emergence of the legal concept of 'pacific blockade'.¹⁷*

The impetus for the establishment of the legal doctrine about 'pacific blockade' is said to have been given by continental State practice and supported by their writers on international law.¹⁸ The essence of pacific blockade consists in the resort to blockade as a means of coercing another State while at the same time maintaining that a state of war does not exist. There was much agreement that the operation of pacific blockade, or blockade without intention to make war, did not preclude military contests between the blockading and the blockaded powers. Yet no right to visit, search or capture the vessels of third parties accrued.¹⁹

The general acceptance of the so-called pacific blockade has been seriously challenged since the second half of the 19th century when certain States held and acted according to the view that a pacific blockader has the right to seize and detain the ships of States other than those blockaded or blockading, if such ships seek to cross the line of blockade.²⁰

At that time, however, the concept of neutrality had developed to such an extent that the attempts to prevent all commerce with a particular State were fairly exactly circumscribed and only recognized with regard to belligerent States involved in an actual state of war. As far as the pacific blockade was concerned, third States did not deny the right of a

¹⁶ Certain States, in pursuance of their declared policy of neutrality, regarded these laws as compulsory for *de facto* wars. Guggenheim *Lehrbuch* II, p. 987, declares: "Seit der zweiten Hälfte des 19. Jahrhunderts wurden die Enthaltungs- und Gleichbehandlungspflichten zulasten des neutralen Staates in immer schärferer Weise formuliert... Diese Tendenz führte zu landesrechtlichen Anordnungen, welche die Fernhaltung vom Kriege durch die Verwirklichung der Grundsätze der integralen Neutralität und der entsprechenden Neutralitätspolitik zu erreichen suchten." See below, pp. 142/43.

¹⁷ A. Hogan: *Pacific Blockade*. 1908; H. Falcke: *Die Friedensblockade*. 1909, and *Le blocus pacifique*. 1919; C. Perry: *British Practice in Some Nineteenth Century Pacific Blockades*. ZaöRV 1938, pp. 672ff; Guggenheim 1954, pp. 419ff; Stone 1954, pp. 292ff.

¹⁸ Perry, 1938, p. 685, observes that the term is the invention of Haute-feuille and first appears in 1848 in his treatise on the rights and duties of neutral nations.

¹⁹ Cf. H.A. Smith: *The Law and Custom of the Sea*. 1948, p. 108, who observes: "During the nineteenth century a practice grew up of imposing what were called 'pacific blockades'. The common feature of these proceedings was that they were all attempts by strong states to impose their will upon small powers by coercive measures, which did not amount to war and could often be enforced without bloodshed."

²⁰ Hogan discovered 14 blockades where this right was assumed and only seven where it was not. See also Perry 1938, p. 765.

State to resort to such a measure as a means of coercion short of a state of war. But it was energetically refused, however, that in such a case, the blockading power had a right to prevent any neutral ship, whether merchant ship or ship of war, from either using the blockaded port or from carrying on their peaceful trade with the blockaded power. This clash of interests between a blockading power and a third State took a very harsh form in 1883 when France blockaded Formosa. It must be remembered, in reviewing this incident, that in the 19th century Great Britain was the foremost maritime State and that her views upon the subject would prevail in the last resort over any claims of continental powers which were not compatible with the fundamental laws and customs of the sea.²¹

In November 1902, the British Government finally committed herself to a statement upon the subject of peaceful blockade, a statement which may be said to have lost nothing of its binding force. It was made with regard to an eventual armed intervention into Venezuela which was considered in that year by Great Britain and Germany in terms of a 'pacific blockade'. In the Memorandum for Communication to Count Metternich of November 29, 1902, Great Britain defined its legal position with regard to pacific blockade. In doing so, she contributed considerably to a distinction between a notion of war implying the rights and duties of neutrality and another notion of material war which did not.²²

²¹ J.A. Spender: *Great Britain, Empire and Commonwealth, 1886-1935*. 1936 p. 526 remarks that "as the chief Naval Power, Great Britain before the war had stood for the largest belligerent rights in time of war, and as the principal presumptive neutral, the United States stood for 'the freedom of the seas' in war as in peace".

²² In the course of the 19th century any controversy about the 'legality' of instituting a blockade without bringing about a state of war had been predominantly concerned with its impact upon the rights of third States. The conditions under which the establishment of a blockade without war is permissible is expressed in the rules adopted by the Institute of International Law in 1887:

"(1) Ships under a foreign flag may enter freely notwithstanding the blockade...

(2) The pacific blockade must be officially declared and notified, and maintained by a sufficient force;

(3) The ships of the blockaded Power which do not respect such a blockade may be sequestered; and, when blockade is at an end, they must be restored to their owners with their cargoes, but without indemnity on any ground."

The Venezuelan blockade caused great irritation in the United States, which was partly due, no doubt, to the sensitiveness on the score of the Monroe Doctrine. See Wheaton-Keith 1944, pp. 97/98; H. Wehberg: *La Police Internationale*. RdC 1934/II, p. 94; J. Basdevant: *L'action coercitive anglo-germano-italienne*. RGDIP 1904, p. 420, commented on this blockade as follows: "En effet, on n'a pas parlé de guerre en vue d'étendre plus largement le cercle de moyens violents, en vue de les pousser aux limites extrêmes, mais uniquement pour écarter les conséquences d'une certaine doctrine... touchant les effets du blocus pacifique. On peut le dire, si les Etats-Unis ne s'étaient pas prévalus de cette doctrine, les trois puissances s'en seraient tenues à l'idée de représailles et auraient effectué le blocus à ce titre."

II. *The British Memorandum of November 29, 1902
concerning Pacific Blockade.*²³

Count Metternich pointed out, in conversation on the 11th instant, that the blockade which he had previously described as a 'pacific blockade', should extend to neutral vessels to this extent, that should such vessels attempt to run the blockade they would be turned back or 'sequestered'. His Excellency added that blockades of this kind had been resorted to by England in 1837 against New Granada; and in

1842-1844 against St. Juan and Nicaraguan ports; by England and France in

1845-1847 against Argentine ports; by England in

1882 against Rio; and by France in

1884 against Formosa. The cases cited are noticed in their order.

The first case cited, that of the blockade of New Granada in 1836, was a blockade in time of peace. The circumstances which led to the blockade were these: —

Mr. Russell, the British Pro-Consul at Panama, was imprisoned by the New Granadian authorities. A demand was made for his immediate release, and for other steps to be taken by the New Granadian Government by way of reparation for the insult.

Compliance with these demands having been refused, the Commander of Her Majesty's ship 'Madagascar' announced his determination to blockade rigorously all the ports of New Granada from Cape Chichibacon to the Rio Dorodos. Two vessels were prevented from entering the port of Carthagena, and two other vessels bound for that port were detained, one a French barque and the other a New Granadian brig. This had the desired effect: the Pro-Consul was liberated and the other demands complied with.

In this instance, although the blockade was nominally at least 'pacific', there was distinct interference with a ship belonging to a third Power. This was, however, at a time when the views of Her Majesty's Government on the principles involved were more fluid and elastic than they have since become.

The facts of the second instance referred to by Count Metternich are as follows: —

In 1843, several cases of gross denial of justice to British subjects, and of flagrant violation of their rights and property, having occurred in

²³ This Memorandum of the British Government called 'Memorandum for communication to Count Metternich' was communicated to the latter on November 29, 1902 (Great Britain, Record Office, F.O. 80, 446, vol. 17); it contained the answer to certain assertions which had been made by the German Imperial Government relative to an eventual blockade of Venezuela. The recent publication of this document, which is reproduced in full in the following, dispenses with any further discussion on the doctrinal speculations which had been made ever since concerning the Venezuelan Blockade of 1902 in terms of war.

Nicaragua, the Government was, in consequence, given to understand that if redress were not afforded to the parties, the port of San Juan would be blockaded.

This intimation having been disregarded, the British Admiral accordingly instituted the blockade, which produced the desired result. The fourth case cited occurred under the following circumstances:—

In 1844 the British and French Governments joined in an intervention with the Government of Buenos Ayres, in order to induce it to discontinue the blockade of Monte Video, which was so prejudicial to the commerce of the River Plate.

In 1845 a British Minister was sent out to Buenos Ayres; when remonstrances were addressed by him and by the French Minister to the Government, but to no effect.

The Admirals of the combined naval squadrons, in consequence, declared to the Buenos Ayrean Government that an end must be put to the hostilities against Monte Video; and they announced that if this were not done, they would have recourse to coercive measures; but these intimations were also ineffectual.

They then intimated to the Buenos Ayrean Admiral that the fleet under his command must not depart; but he made the attempt, and was prevented; the Admirals then took possession of the fleet. The bombardment and capture of Colonia followed and Buenos Ayres was placed in a state of blockade.

A joint expedition up the Rivers Uruguay and Paraná, which had been closed to commerce, took place soon afterwards, and was attended with success. The Blockade of Buenos Ayres, so far as Britain was concerned, ceased in July, 1847.

In neither of these cases was there, so far as I am aware, any interference with the shipping of third Powers; but it seems clear from the terms of the notification of blockade issued in both cases that the operations were, in intention and in fact, in the nature of a blockade *jure gentium* rather than a 'pacific' blockade.

Even, however, if it were assumed that these blockades were pacific and that it could be shown that interference with vessels of third Powers had taken place, too much importance cannot be attached to the precedent, inasmuch as the views of His Majesty's Government have admittedly by degrees undergone a change in this respect, and the decided attitude adopted by Lord Granville towards France in the case of the Formosa blockade in 1884, of which details are given below, is an authoritative record of the principles by which His Majesty's Government have been guided in more modern times, and from which they have not departed in practice.

In fact, since 1850 no Power except France has, it is believed, claimed the right to interfere with the vessels of a third Power in the case of pacific blockade.

It has not been found practicable to identify the instance of a British blockade of Rio in 1882, alluded to by Count Metternich, but it seems not improbable that this Excellency refers to the incident

mentioned in the annexed extract, which occurred in 1862. On that occasion, however, the action of His Majesty's Government was in the nature of reprisals, rather than of a pacific blockade.

In 1862 the fact was brought to the notice of the British Government that in the previous year a British barque (the 'Prince of Wales') had been wrecked off the coast of Brazil, and that an outrage had also been committed on some officers of Her Majesty's ship 'Forte' by a Brazilian policeguard; the British Government at once demanded from the Brazilian Government compensation for the losses occasioned to the owner of the vessel by the plunder of the wreck and crew.

As the Brazilian Government refused to accede to the principle of responsibility attributed to it with regard to the wreck of the 'Prince of Wales', and also refused to give satisfaction for the indignity to which the officers of Her Majesty's ship 'Forte' were subjected, it was found necessary to have recourse to reprisals.

Five merchant vessels belonging to Brazilian citizens were accordingly seized and held as prize by Her Majesty's ships of war; but upon the Brazilian Government's compliance with the British demands the captured vessels were at once released.

With reference to the French view of what constitutes "un blocus pacifique", and to what passed in 1884 with reference to the French blockade of Formosa in that year, the following facts may be of interest:

M. Waddington in a note to Lord Granville of the 5th November, 1884, said:

"The fixed resolution of the French Cabinet is to strictly limit the blockade to the arrangements necessary in order to absolutely prevent access to the waters specified in the Notification of the 20th October. It does not intend now, any more than it did before, to claim the right which belongs only to belligerents of searching and capturing foreign ships on the high seas. The action of the French cruisers will be limited to maintaining an effective blockade, and to assure its being respected either by *driving back* or by *capturing* the ships which may attempt to force the lines."

This view as to the rights conferred by a pacific blockade was, however, contested by Lord Grandville, who pronounced it to be opposed to the opinions of the most eminent statesmen and jurists of France, and to the decisions of its Tribunals, and to be in conflict with well-established principles of international law.

His Lordship further intimated that such action, in conjunction with other acts of hostility, would be considered as constituting a state of war.

It will be seen from what has been stated above that even if there may have been any irregularity of practice in some of the earlier instances of pacific blockades, the principle was early admitted by this country that no State can in time of peace endeavour to obtain redress from a second State by means which inflict loss and inconvenience on other countries, and this has been insisted on in public utterances of the clearest kind by (for instance) Lord Palmerston as early as 1846, and by Lord Granville in 1884 on the occasion above referred to.

Count Metternich's statements as to the course adopted by England on previous occasions appear, to some extent at least, to be based on a misapprehension; but it has been brought to my notice that so eminent an authority on international law as M.F. de Martens, in a recent work, when dealing with the subject of pacific blockades, has been misled by M. Hautefeuille into saying that: "L'Angleterre ne laisse passer ni les navires de l'Etat bloqué, ni les navires neutres; elle confisque les uns et les autres".

It is possible that Count Metternich may have been similarly misled. The statement is, however, clearly inaccurate, and in view of all the considerations above set forth it would be impossible for His Majesty's Government to concur in his Excellency's proposal that the so-called pacific blockade at Venezuelan ports should extend to the sequestration of neutral vessels should they attempt to run the blockade.

In that case the position would appear to be as follows;

A 'pacific blockade' (so-called) against Venezuelan vessels only would be, *ex concessis*, unavailing.

A 'pacific blockade' involving any interference (as, for example, 'turning back' or 'sequestration') with the vessels of third Powers would be opposed to our declared and long-established policy, and they could not, therefore, be parties to any such measure.

On the other hand, His Majesty's Government must be prepared in the last resort to supplement the seizure of the Venezuelan gun-boat or gun-boats by some further measure of coercion of the kind generally known as 'measures of restraint falling short of actual war'. If no sufficiently effective measure of this description can be found then nothing will remain but actual war, which state of things would be brought about at once by the establishment of a blockade *jure gentium*, which is the only measure which in strictness can properly be called a blockade. It is, however, desired to avoid any course of proceeding which will inevitably entail or create a recognized state of war.

The measure which suggest themselves to His Majesty's Government are (1) the seizure of the custom house or custom houses, or (2) the seizure of a port or ports in Venezuela, of course, in the latter case, permitting free access to the vessels of third Powers.

There are other measures, such as the seizure and sequestration of those merchant vessels of the offending State which have been employed on previous occasions, but they do not seem to be of much practical utility in a case where the commerce and shipping of Venezuela, or the property, outside of the limits of Venezuela, of Venezuelans are concerned, although they might be of use in the case of a minor State which had a comparatively large mercantile marine.

The various measures mentioned are, no doubt, all of them, in essence, acts of war; if Venezuela chose so to treat them, she would be justified in taking that course.

It is, moreover, plainly in her interests not to regard them in this light, and they form a convenient *mitior usus* which is suitable to the case of a recalcitrant petty State in controversy with Great Powers of

overwhelming strength, who, while desiring to obtain proper redress, are unwilling to dismember or destroy a puny antagonist.

With regard to the French blockade of Formosa in 1884, Count Metternich has pointed out that the objection of His Majesty's Government that they had themselves protested against the treatment of their merchant vessels at that time was, in the opinion of the Imperial Government, met by the contention that the British Government in their correspondence with the French Government at the time expressly declared that they regarded that blockade not as a pacific, but as a belligerent blockade, and therefore had no reason then to enter into a discussion as to the real grounds for a pacific blockade.

On that occasion the British Government entirely recognized the French measures of blockade after the French Government had explained that they would abstain from searching or capturing British ships on the high seas. But the search or capture on the high seas of neutral vessels would not be required in a blockade of Venezuelan ports as proposed by the German Admiralty. In a further communication received by Lord Lansdowne on the 23rd November, Count Metternich said that his Government were disposed to have recourse to a belligerent blockade, if absolutely necessary. Such a blockade would, however, imply a state of war which could only be brought about either by hostilities on the part of the Venezuelans or by a formal declaration of war on the part of England and Germany. It seemed, however, doubtful whether the Venezuelans would commence hostilities by opposing the seizure of their war ships, and on the other hand, his Government could not declare war without the consent of the Federal Council. Valuable time might thereby be lost. In consequence, his Government would prefer to adopt the coercive measures before spoken of: in the first place a pacific blockade, and if that did not seem acceptable to His Majesty's Government, in the second place, the seizure of the Venezuelan custom-houses.

The facts of the blockade of Formosa are briefly:²⁴

III. *The practice of blockades with regard to neutrality contributes to the emergence of the concept of war in the formal and material senses.*

The undetermined legal evaluation of the Venezuelan blockade in 1902 with regard to war gave a fresh impetus to writers of international law in their efforts to conciliate the legal doctrine of blockade with State practice. It goes without saying that the status of the so-called 'pacific blockade' has been tried to be specifically delimited from wartime blockade. All these efforts give evidence that there is in the last resort only one genuine criterion for determining the position of pacific blockade with regard to war. It consists in the respect by the blockading power

²⁴ The rest of this Memorandum consists of a narrative of the French blockade of Formosa in 1884 and the Franco-British diplomatic correspondence concerning its legal evaluation. Cf. J. Westlake: *Collected Papers* 1914, pp. 572ff; F.v.Martitz: *Ueber Friedensblockaden*, ZfV 1920, pp. 611ff. at p. 613.

of the unhampered, peaceful relationship between the blockaded power and third States. That is to say that the identity of any blockade with a legal state of war depends upon its mode of application with regard to third States.²⁵ Since the second half of the 19th century, a general rule developed to the effect that any resort to blockade as a means of national policy brings about a state of war, provided that the right of visit and search and the condemnation of good prize is intended to be enforced with regard to third States. As early as the American Civil War, the blockade of the Confederacy with effect upon third States was accepted by the latter as an act possible only under the status of war.

The right of prize and capture has its origin in the *jus belli*, and is governed and adjudged under the law of nations. *To legitimate the capture of a neutral vessel or property on the high seas, a war must exist de facto*, and the neutral must have a knowledge or notice of the intention of one of the parties belligerent to use this mode of coercion against a port, city, or territory, in the possession of the other.²⁶

This rule paid no attention to the fact that, for reasons of political convenience, such a blockade was termed to be pacific. With regard to the latter, a very explicit statement had been given in the Library Memorandum of September 1894:

In regard to what are termed pacific blockades, where a State resorts to blockade as a means of coercion while maintaining that a state of war does not exist, Her Majesty's Government do not deny the right of a State to resort to such a measure as a means of coercion while refraining from a declaration of war or other acts of hostility. Great Britain has in fact, taken part in such blockades. But Her Majesty's Government hold that in such a case the blockading Power has no right to prevent any neutral ship, whether merchant-vessel or ship of war, from using the blockaded port. Any interference with the ships of a third nation may in their opinion be properly regarded by that nation as an act of belligerency implying and only to be justified by the existence of a state of war.²⁷

²⁵ E.S. Colbert: *Retaliation in International Law* 1948, p. 103, remarks that "Pacific blockade had generally been enforced in accord with the laws of wartime blockade but even here there has been no uniformity of the crucial question of the rights of third States and should a retaliating power decide to depart completely from the laws of blockade it is to be doubted that there is any rule to stop it from doing so." Stone 1954, pp. 292/93, no longer pays any attention to this fact.

²⁶ Earl Russel to Mr. Adams (London), Aug. 30, 1865, where he quoted this passage from the Prize cases 1862 (Black's Reports, Supreme Court, vol. II, pp. 666-670) as 'the law laid down by your own Courts on this subject'. *Fontes* No. 2483. Perry 1938, p. 768, rightly observes that the mere fact that a blockade does not take place after the outbreak of war 'does not make it a pacific blockade in the technical sense if there is no intention on the part of the blockading government to avail itself of that particular institution'.

²⁷ Discussion with Count Metternich on the Nature and Attributes of Pacific Blockades, November 28, 1902. (Record Office, F.O. 80.446, vol. 17.)

To all intents and purposes it was made clear by State practice since the end of the 19th century that 'pacific blockade' meant the commitment of war acts between the two contending parties which must not infringe on the rights of third powers.²⁸ Even if the application of pacific blockade were tantamount to ordinary warfare between the blockading and blockaded powers this did not mean war *jure gentium* so long as the right of visit, search and condemnation was not claimed by either of the contending parties.²⁹ If, however, they did so, they were prevented from disclaiming their *animus belligerendi* in the event third States chose to regard the exercise of visit and search as flowing from a state of war already in existence. So far, it was indeed their declaration of neutrality which had a constitutive effect upon war *jure gentium*.³⁰

As to blockades which did not infringe on the rights of third States, different appraisals have been given to them according to whether or not they were established in pursuance of a material war.

Pacific blockades in pursuance of a material war have been established either by the belligerent parties with inter-belligerent effect or by third Powers for the supervision and limitation of that material war.³¹

²⁸ M. Cruchaga: *Nociones de derecho internacional*, 1923, vol. 1, p. 517, calls pacific blockade 'un acto de guerra realizado en tiempo de paz', while Stone 1954, p. 292, speaks of an 'undeniably warlike act'.

²⁹ The contending parties in this regard did not need to have the quality of States. See M. Carafa to M. Canofari (Turin) Apr. 15, 1858; *Fontes* No. 2432 (translation): "There is no doubt that captures and prizes are the consequences of a state of war which was, as a principle, recognized by Grotius only in the case of declared war — that is to say, of war waged between nation and nation. But when it was seen that not only by a foreign power, but by individual citizens gathered together in arms, a state of violence might be promoted which called for the adoption of warlike measures (of which the first example in the history of Modern Europe was the rising of Flanders against Philip the Second in the sixteenth century) Grotius recognized this as a case of intestine or mixed war." Cf. P.B. Potter: *Pacific Blockade of War?* AJIL 1953, p. 274.

³⁰ Cf. Eagleton: *Acts of War*. AJIL 1941, p. 324. He observes that as this peculiar situation does not appear to exist except for blockade, it may perhaps be explained by the fact that any blockade necessarily interferes with the right of third States if it is intended to cut off all sea-borne trade of the blockaded power. Any interference with the right of third States will not be recognized by them except under the status of war.

³¹ Rousseau 1953, p. 618, holds the ends to be attained (la finalité des mesures appliquées) as the only justification for pacific blockade. In reliance of these ends he classifies blockade under 3 headings: (1) juridical blockade, i.e., a blockade which is to redress infringements of international law; (2) humanitarian blockade, which is established for redress of infringements of humanity; (3) political blockade, which purports to serve political ends. Only humanitarian and judicial blockades are pretended to be legitimate pacific blockades. Yet it must be observed that the question of legitimacy of pacific blockade, such as is viewed by Rousseau, has been of little if any concern in practice.

In our day Guggenheim rightly declares that "le blocus conserve son importance pratique dans les guerres locales. Il possède une signification particulière dans le cadre de l'organisation internationale, lors de l'exécution de mesures d'exécution collectives". *Traité II*, pp. 421/22.

(1) Pacific blockade as established by either of the belligerent parties with inter-belligerent effect: This is regarded as legitimate warfare between the contending parties and must be executed in conformity with the corresponding laws of war. If resorted to by States, pacific blockade in this event remains only as long as both parties are willing to regard it as in that light and to refrain from exercising the right of visit and search with regard to third powers.³²

Special consideration has to be given in the event that such a blockade results from a civil strife. As a rule, third States are willing to respect it as a police action under municipal law as long as the parent State can give evidence of the effectiveness of the blockade as well as of its ability to restore peaceful order within its territory by police action. A lack of effectiveness, however, produces in its turn evidence to third States that both insurrection and its counteracting police measures have matured from the state of insurgency to that of regular warfare. If until such time third States were under the obligation to admit the right of visit and search as being a police action of the parent State in pursuance of municipal law, they are freed from this obligation at the moment the insurrection develops into regular warfare.³³

³² A pacific blockade of this kind occurred in 1937 when Japan directed her blockade only against Chinese vessels.

³³ Cf. E. Dickinson: *The closure of ports in control of insurgents*. AJIL 1930, pp. 69ff; Smith: *Some problems of the Spanish War*. BYB 1937, pp. 17ff. The establishment of blockade is not legally reserved to States only. All political entities being entitled to belligerency under international law may establish a blockade. "To found a general right of insurgent blockade upon the recognition of belligerency of an insurgent by one or a few foreign powers would introduce an element of uncertainty. The scale on which hostilities are conducted by the insurgents must be considered. In point of fact, the insurgents may be in a physical position to make war against the titular authority as effectively as one sovereign could against another." (Hay to the Secretary of the U.S. Navy, November 15, 1902), AJIL 1909, p. 56. The following statement of Lord John Russel which he made on June 27, 1861 in regard to an announcement made in that year by the Government of New Granada concerning the closure of certain ports in possession of persons engaged in civil war, has often been considered as formulating international law on this issue: "The Government of New Granada has announced, not a blockade, but that certain ports of New Granada are to be closed. The opinion of Her Majesty's Government, after taking legal advice, is that it is perfectly competent to the government of a country in a state of tranquillity to say which ports shall be open to trade and which shall be closed; but in the event of insurrection or civil war in that country, it is not competent for its government to close the ports that are *de facto* in the hands of the insurgents, as that could be a violation of international law with regard to blockades." Cf. Moore Digest VII, p. 809; see *Oriental Navigation Company* case, AJIL 1929, pp. 434ff.

An instance of pacific blockade since World War II can be found in the establishment of blockade by National Chinese Government against Communist China on June 25, 1949. See L.H. Woolsey: *Closure of Ports by Chinese National Government*. AJIL 1950, pp. 350 ff. It seems clear, says Woolsey rightly, that the Chinese National Government "cannot use the force on the high seas to prevent ingress and egress of foreign vessels, since this is a measure only accorded to belligerents in time of war according to the traditional view". To this he adds that the Chinese National Government, however, "has

(2) Pacific blockade by third powers as a means of international police action with regard to a material war: While the proclamation of a blockade is generally held to be liable of interpretation as an act of war, the blockade of third powers with controlling effect upon a material war is precluded from any such interpretation. Such blockade is generally recognized as organized international police action because of the blockading powers abstaining from using it to their material benefit.³⁴

Paragraph 3. The application of the laws of neutrality in a "de facto" war characterizes the latter as formal.

The practice of neutrality in modern times must be examined separately from the laws of war inasmuch as it contributed to the dual character of the modern concept of war. On the one hand the purpose of a definition of war was precisely said to provide States with the means of dating the existence of neutral rights and duties. On the other hand it was recognized that the practice of neutrality with regard to *de facto* wars was material to the development of the concept of war in international law. That is to say that in instances where the alleged

a perfect right to proclaim a blockade (in the technical sense) of the insurgent port and thereby automatically concede the existence of a full fledged war and acquire the accompanying belligerent rights of visit, search and capture, subject to prize court proceedings". P. 354. See also Potter AJIL 1953, p. 274.

The blockade which was established on May 18, 1948 by Syria against Israel was no doubt conceived by the former as of being a belligerent blockade. Both the general reluctance of the international community to let the Palestine conflict evolve into a formal war and the refusal of some of the major Powers, especially the United States, to admit the right of visit and search with regard to third powers, reduced that blockade to a pacific one.

With regard to the blockade in the Spanish civil war in 1937, Judge Goddard declared in *Tatem v. Gamboa*: "I do not suppose that, in the circumstances, His Majesty's Government would recognize the decree of any prize court which might be set up in this civil conflict in Spain, considering that they have not recognized General Franco as having belligerent rights."

³⁴ See the blockades by Great Britain and France of Holland in 1832 in order to compel Holland to acquiesce in the settlement which the powers had reached relative to the separation of Belgium; by the great European Powers in 1897 with regard to Crete after having imposed the peace settlement of September 18, 1897, in order to save Greece from the victorious Turks. Cf. Pitt Cobett: *Leading Cases*. 6th ed., 1947, vol. I, pp. 383ff.

The control of the kind that was established by the great European Powers in 1937 with regard to the civil war in Spain may be equally considered under this issue. The blockade of Russia in 1919/20 by the Allied Powers was intended to confine the war in Russia to its territory and to help in reinstating the National Government. Cf. Wehberg, RdC 1934/II, p. 93.

³⁵ The Harvard Draft Convention on Rights and Duties of Neutral States in Naval and Aerial War defines a neutral State as "a State which during the existence of a war is not a belligerent in that war". AJIL, 1939, Suppl. p. 211. That Convention starts out from the assumption that it makes no difference whether the war to which it applies, is defined by *animus belligerendi* or by facts. Nor is it of any relevance whether war is legal, illegal or extra-legal. Cf. P. Jessup: *The birth, death and reincarnation of Neutrality*. AJIL 1932, p. 793.

belligerents denied or refused to admit the existence of a state of war, the will of third powers decided *inter partes* whether that war was formal or remained material.

With the opening of the era of collective security the member-States of the League were asserted to be bereft of their right of neutrality and accordingly prevented from converting a war of sanction into a formal war *inter partes* by declaration of neutrality. In a war of sanction, the status of belligerency is certainly applicable to all States which participate actively in the execution of armed sanction. The legal implications of a war of sanction are, however, contingent upon an efficient anti-war agency. For the time being that efficiency has not generally been secured. As a consequence, the practice of neutrality with regard to abortive wars of sanction will be of concern for the qualification of armed conflicts in terms of war.

I. *Neutral policy in municipal law does not affect the legal character of wars.*

Contemporary laws of neutrality are dealt with in international law as well as in municipal law. The latter may or may not be compatible with the status of neutrality under international law.³⁷ Cases must be examined individually to determine whether laws of neutrality in municipal law have been enacted by way of reference to international law or whether they express only a policy of neutrality which, by its very nature, is preventive and therefore concerns all conflicts which may lead up to a war. In the latter case the application of municipal acts relative to neutral policy is of no concern for the concept of war in international law. This, however, does not hold good for municipal acts like the American Act of November 4, 1939, where the issuance of a proclamation of neutrality was contingent upon a finding by the President or Congress that a state of war existed.³⁸ Here the President or Congress was obliged to take account of the rules of international law relative to the creation of war.

It is of importance that in the latter instance the recognizing of war with regard to neutrality was gradually extended to various international conflicts implying resort to armed force, such as civil wars, international *de facto* wars, armed interventions and wars of sanction. The declaration of neutrality in these instances very often used to be preceded by a declaration which qualified the armed contest in terms of belligerency.

³⁶ Cf. Hindmarsh AS Proceeding, 1938, pp. 120/21.

³⁷ Cf. Castrén ArchivVR 1955, pp. 30/31.

³⁸ AJIL, 1940, Suppl. pp. 44ff. It appears that the American Neutrality Act of May 1, 1937 was a municipal act relative to an American policy of neutrality, the so-called isolation, rather than an act relating to neutrality under international law. This follows from Section 1 par. (c) of that Act which entitled the President to proceed to municipal legislation of neutrality whenever "a civil strife exists in a foreign State". Cf. Kunz AS Proceeding 1938, p. 126; Q. Wright: *Repeal of the Neutrality Act*. AJIL 1942, pp. 8ff.

The system of recognition has been applied to determine whether *de facto* hostilities constitute war, civil strife, reprisals or aggression and whether the status of a given state or government during such hostilities is one of belligerency, neutrality, insurgency, peace, aggression, defense or support.³⁹

The extension of State practice with regard to neutrality urged very strongly for a distinction between formal war and material war. Viewed from the law of neutrality, the difference between formal war and material war consists in the fact that the application of neutrality is held to be compulsory in a formal war whereas it is left to the discretion of States in case of material war.⁴⁰ If a State proceeds, however, to a declaration of neutrality with regard to a material war, the latter is converted *inter partes* into a formal war.⁴¹

II. *Neutrality in a system of collective security and its impact upon the concept of war.*

The handling of neutrality in a system of collective security very strongly urged for a distinction between material war and formal war. It is to be remembered that the classical concept of neutrality comprised two restrictions incumbent upon the State: (1) a complete abstention from military aid in favour of one of the belligerents; (2) an impartial

³⁹ Q. Wright: *The Present Status of Neutrality*. AJIL 1940, p. 404. W. Grewe: *Die Bestimmung des Kriegszustandes*. ZADR 1940, p. 356, rightly observes that the system of recognition does not by itself clarify the legal character of armed conflicts. See Guggenheim Lehrbuch II, p. 979.

⁴⁰ Guggenheim Traité 1954, p. 510: "Le droit de la neutralité se rattache à l'existence d'une guerre matérielle. Mais il n'est *obligatoire* que s'il y a guerre au sens formel. Lorsque, dans une guerre civile, les insurgés ne sont pas reconnus comme belligérants, l'Etat neutre n'est donc pas obligé d'appliquer les règles du droit de la neutralité; il peut continuer à appliquer, en tout ou en parties, les règles du droit de la paix."

⁴¹ While the existence of a material war is determined by facts, the finding of a State that it is necessary to apply the rules of neutrality certainly involves political discretion. Wright held the view that the latter, however, was dependent upon the opinions of the States of the World. That author declared with regard to the American Neutrality Act of 1939: "There has been much discussion as to whether the existence of a state of war under international law depends upon the fact of large-scale hostilities, upon the manifestation of an *animus belligerendi* by some state, or upon general recognition by the states of the world. The phraseology of the most recent American Act appears to lend weight to the latter hypothesis, as does the practice of the United States in declining to find that a state of war either exists in China or existed recently in Finland." *The Power to declare neutrality under American Law*. AJIL 1940, p. 306. Jessup AJIL 1954, p. 100, observes with regard to the Manchurian conflict that the application of the Neutrality Act would have been, under the circumstances, disadvantageous to China with whom the United States Government was in sympathy.

and equal treatment of the belligerent parties.⁴² This concept of absolute neutrality which prevailed in the era of the *jus bellum ac pacis* could no longer be admitted in an international society of collective security. It became obvious that any effort to prevent war by effective sanctions could come to naught if the members of that society retained the right of absolute neutrality in the event of armed sanctions.⁴³

Once there is a universal, or universality-enforcing, security-organisation which regulates or prohibits the right to resort to war and to force, and which determines whether or not a specific use of force is lawful, there is no longer any question of the traditional essentials of the state of war, the juridical equality of the contending parties and the general rights and obligation of neutral States based on that equality. Then it is a matter of lawfully and unlawfully contending parties and of the general obligation for all the others to assist and support the former.⁴⁴

Yet from the beginning of the League of Nations which marked the transition from an international alliance towards a collective international organ it became obvious that the principle of neutrality could not be abandoned.⁴⁵ A modification of the law of neutrality was, however, brought about materially as well as formally in order to take into account the needs of State practice. The material change in the status of neutrality was expressed by the idea of qualified neutrality. The state of qualified neutrality in an international community of collective security is derived from and justified by the legal fact that a war of sanction constitutes illegitimate war for the lawbreaking State while it is legitimate war for the States which partake in the execution of armed sanctions. Qualified neutrality can be said to be a corollary to the discriminating character of the concept of war in a community of

⁴² Cf. Castrén 1954, pp. 448 ff.; M. Huber: *Das Neutralitätsrecht in seiner neuesten Gestaltung*, pp. 12/13; Liszt 1925, p. 534; T. Komarnicki: *The Place of Neutrality in the Modern System of International Law*. RdC 1952/I, p. 406; H.J. Taubenfeld: *International Actions and Neutrality*. AJIL 1953, pp. 377/78.

⁴³ J.F. Lalive: *International Organisation and Neutrality*. BYB, 1947, p. 72: "It may be said that collective security and neutrality are incompatible: 'The more there is of the one, the less there is of the other' (Moore Digest VII, p. 860)." To the same effect C. Schmitt: *Völkerrechtliche Neutralität und völkische Totalität*. Revue de droit (Gouffre), 1938, p. 318. Some American writers asserted that neutrality was immoral and destructive to international relations. Cf. Wright, AJIL 1942, pp. 22/23 with numerous references in n. 46. Eagleton 1948, p. 104, maintains that "neutrality served in no way as a substitute for war in settling disputes, in upholding rights, or in remedying wrongs." To an opposite effect Castrén ArchivVR 1955, pp. 25/26.

⁴⁴ Pompe 1953, p. 36. Cf. Harvard Research, AJIL, 1939, Suppl. pp. 819 ff.; E. Borchard: *Effects of War on Law*. AJIL 1946, pp. 620 ff.; Annuaire, 1954, p. 557.

⁴⁵ Cf. Taubenfeld, AJIL 1953, pp. 378 ff.

collective security.⁴⁶ Logically, the idea of qualified neutrality is founded on the assumption that there is no contradiction to the principle of neutrality if the services which 'qualified neutral States' have to perform in a war of sanction are settled in advance. Such services may be comprised by economic and financial support in favour of sanctioning forces. Last but not least, the status of qualified neutrality was declared to be compatible with State practice as neutrality had never been "quite so strictly applied as the books said that it ought to be and were inclined to assume that it was", that neutrality was often not truly impartial, but 'qualified' much as it had been in the 18th century.⁴⁷

Qualified neutrality means discriminative application of the rules of neutrality with regard to the belligerents. At any rate, in a war of sanction, a qualified neutral State could retain its neutrality only as long as the 'unlawful belligerent' could not reasonably regard the acts of discrimination as acts of co-belligerency. Qualified neutrality presupposes a material war in process. It is applicable without any declaration of war or other forms of *animus belligerendi* but implies a previous condemnation of the law-breaker by the international community. In the event that the system of collective security fails to remain effective the traditional conceptions of neutrality will resume their part in international law. Hence the compulsory application of the laws of neutrality again depends on whether a war is formal or material.

The formal change of the concept of neutrality in a system of collective security was expressed at the Budapest Conference of the International Law Association. Whereas formerly the obligations of neutrality had arisen automatically on the outbreak of war, the view was now expressed that this would not be so if the Pact were violated but that each State would — in regard to the Covenant — be free to determine for itself whether it would not perform the duties of neutrality in such a case.⁴⁸

⁴⁶ Qualified neutrality being a corollary to the discriminative concept of war, the law-breaking State is not entitled to reparation from qualified neutrals who permit their territory to be used as a base by the military forces of the international community or who enact discriminatory commercial embargoes. Wright AJIL 1933, p. 59, declares that this is so "because the non-participants' rights under the Pact have been infringed by the primary belligerent in starting war, and continue to be infringed every minute the war continues." H. Lauterpacht: *Neutrality and Collective Security*. Politica 1936, p. 141, holds the view that the modification of the law of neutrality under the Covenant "does not follow automatically upon a mere renunciation or limitation of the right of war. But it is the result of a system in which the parties, while bound to proceed against the wrongdoer, have not undertaken to suppress the aggressor by means of formal war." Cf. Castrén ArchivVR 1955, p. 36.

⁴⁷ Brierly 1945, pp. 29/30. Cf. also Guggenheim SJIR 1945, p. 22; Kormarnicki RdC 1952/I, p. 432. Reference is generally made to the Boer War where British troops had been allowed to pass through Portuguese territory. For further references see Lauterpacht Politica 1936, p. 145.

⁴⁸ Cf. Dehn: *The Effect of the United Nations Charter on the Development of International Law with Special Reference to the Status of Neutrality and the Hague and Geneva Convention*. Reports ILA, 1946, p. 40.

Since the Charter of the United Nations, the right of a neutral to discriminate against the primary belligerent and to penalize an aggressor is said to be transformed into a duty.⁴⁹

That duty may assume the complexion of the supreme obligation to abandon the neutral status itself. It may, however, be compatible with the retention of neutral status in all cases in which the system of collective security so permits and in which an aggressor does not elect to add to his original unlawful act the further illegality of treating as a belligerent a neutral State which discriminates against him. The position admits of little doubt in cases which a valid determination of aggression has taken place in accordance with the Charter. In such cases, to the duty of the Member of the United Nations to abandon neutrality or impartial neutral conduct there corresponds the right of the United Nations and of States engaged in hostilities in pursuance of such determination to exact from other States a line of conduct regardless of the traditional law of neutrality.⁵⁰

With regard to the concept of war in the formal and material senses it does not matter, however, whether neutrality is or is no longer practicable, because it takes precise account of either of the alternatives. On the one hand the distinction of formal war and material war is very much due to the practice of avoiding the implications of neutrality in international armed conflicts at a time when States were still at liberty to declare war and to resume the status of neutrality. On the other hand, after the outlawry of war and the abrogation of absolute neutrality, the concept of war in the formal and material senses provides for the event that the former becomes inapplicable or ineffective.⁵¹ In that event it is with regard to the practice of neutrality that armed conflicts will be determined either as material or as formal wars.

SECTION 2. THE EVOLUTION OF THE STATUS OF REPRISALS WITH REGARD TO WAR.

Paragraph 1. The general characteristics of reprisals.

1. On the difference of reprisals in time of peace and reprisals in time of war.

In its general acceptance, a reprisal has been defined as "a measure of self-help taken by the injured State in reply to an act contrary to the law of nations on the part of the offending State, *after summons which*

⁴⁹ The preparatory works on this subject have been outlined by Taubenfeld, AJIL 1953, pp. 384 ff. Cf. Komarnicki Grotius Transactions, 1953, pp. 83 ff.

⁵⁰ Lauterpacht, BYB 1953, pp. 237/38. See also Taubenfeld, AJIL 1953, p. 395.

⁵¹ Cf. Guggenheim, Rep. ILA, 1946, p. 46.

proves unavailing. Its effect is to suspend temporarily the observance of a particular rule of the law of nations in the relations between two States. It is *limited* by the experience of humanity and by the rules of good faith, applicable in international relations. *It would be illegal if a previous act, contrary to international law, had not provided its justification.* Its object is to compel the offending State to make reparations for the injury, or to return to legality, avoiding further offences.”⁵²

In giving this all-embracing definition of reprisal, the German-Portuguese Arbitral Tribunal examined primarily its legality. In legal doctrine and practice, however, the instrument of reprisal is considered under the dual aspect of reprisal in time of peace — often referred to as peaceful or peaceable reprisal — and reprisal in time of war.⁵³

(1) A reprisal in time of peace is considered in legal doctrine under the heading of ‘measures short of war’. This denomination is so much the more pertinent as it deals in the main with military reprisals and its distinction from war. To the extent, however, that military reprisal is liable to either initiate a state of war (formal war) or to bring about material war (in the event it is upheld after being resisted by armed force), it is attributable to the province of the *jus ad bellum*.⁵⁴

⁵² *The Angola Case* (1928, 1930) Portugo-German Arbitral Tribunal; reported in Cheng, 1953, p. 97. For a general study on reprisal cf. Hall-Higgins: *A Treatise on International Law*. 8th ed. 1924, pp. 133 ff.; Scelle 1948, pp. 867 ff.; Guggenheim Lehrbuch 1950, pp. 583 ff.

⁵³ Guggenheim Lehrbuch 1950, p. 585, distinguishes among peaceable reprisals those which are genuinely peaceful and those which are armed ones: “Die Repressalien sind entweder sogenannte ‘friedliche’ oder sogenannte ‘bewaffnete’. Als ‘friedliche’ gelten die nicht militärischen Zwangsakte. So z.B. die vertragswidrig vorgenommene Ausweisung fremder Staatsangehöriger in Friedenszeiten, die Beschlagnahme der Guthaben eines fremden Staates oder seiner Staatsangehörigen.” H. Heyns: *Die Anwendung von militärischen Repressalien unter Völkerbundsmitgliedstaaten*. 1938, p. 15, holds the opinion that a distinction between reprisals in time of peace and reprisals in time of war is not justified. Yet he admits “dass eine Tendenz zur Entwicklung eines Sonderrechts für die Kriegsrepressalie festzustellen ist.”

We do not deal with the juridico-philosophical question of the natural right to exercise reprisals. Hindmarsh 1933, p. 86, remarks that “if the right to exercise reprisals is to be derived from elementary concepts, such as the right of self-defense or the right to exist, it is almost futile to discuss limitations, for such concepts are intrinsically indeterminate.” Smith 1948, p. 136, asserts that the right of retaliation at discretion “is a necessary consequence of the character of the law itself, which has no common authority for its enactment, interpretation or enforcement. To this it must be added that the establishment of a common authority does not by itself furnish an automatic solution of the problem.”

⁵⁴ Cf. Stone 1954, pp. 285/86, 289/90.

(2) Reprisal in time of war is characterized as an instrument of sanction in the law of war.⁵⁵ In that respect it holds a decisive part in the *jus in bello*.⁵⁶

II. Reprisals and the plea of "tu quoque".

Besides the legal instrument of reprisals, specific consideration must be given to the plea of *tu quoque*. In law the difference between these two concepts has grown out of the fact that by way of conventional laws of war, certain acts in war have been prohibited to such an extent that they are even precluded from being resorted to by way of reprisal.⁵⁷

⁵⁵ Stone 1954, p. 354, rightly says that the premise on which retaliation in war proceeds is, that a belligerent's duty to observe the laws of war "is not absolute, but conditional on the enemy's reciprocity." J.M. Spaight: *Air Power and War Rights*. 1947, p. 51, says that reprisals should mean the response to an enemy's violation of the laws of war by a violation on one's own side. "Actually in the war of 1914-18 the term was applied, especially in France, to warlike acts which were, indeed, the answer to alleged violations of international law by the enemy even if no question of reprisals had arisen."

The British raid of April 14, 1917, upon Freiburg i/Br. was officially characterized as a reprisal for the torpedoing of the hospital ship *Asturias*, which took place on 20/21 March, 1917. In World War II the German air attacks on London which began on September 7, 1940, were based on the right of reprisals. The use of the Vergeltungswaffen was described as retaliation. See Spaight, *ibid*.

The measures directed towards the total prevention of enemy seaborne trade during the two World Wars were in part defended as an exercise of the right of reprisal. Cf. Smith 1948, p. 108.

⁵⁶ R. Erich: *Einige völkerrechtliche Kriegs- und Friedensfragen*. ZfV, 1920, pp. 45 ff. draws a distinction according to whether reprisal in time of war is aimed at a person in its individual capacity (quasi reprisal) or whether it is aimed at the State (wartime reprisal). With regard to 'prophylactic reprisals' against individuals Kunz 1935, p. 32, declares: "Dagegen gehört das Nehmen von Geiseln nur zu dem Zweck der Verhütung künftiger Rechtsverletzung, eine Massnahme, die manchmal als 'preventive prophylaktische Repressalie' bezeichnet wird, nicht unter den Begriff der Kriegsrepressalie."

As a rule, violation of the laws of war by one belligerent which causes the analogous conduct by the enemy on the basis of reprisal has no law-creating faculty. Yet Kunz, AJIL 1951, p. 51, reasonably remarks that "if valid rules of warfare are violated continuously by all the belligerents and go unprotected and unpunished", it can be possible that new rules of war have come into force by a revolutionary and accepted practice of States.

In the *Kappler* case (see below p. 217 and A.D. 1948, case n° 151; AJIL 1955, pp. 96/97) the defendant pleaded that the act committed by him was a legitimate act of reprisal. Without deciding whether the right of reprisal is limited by the principles of proportion between the hostile act and the reprisal, the court was of the opinion that the hostile act was committed by persons who did not have the quality of legitimate belligerents. Cf. Goodhart 1940, pp. 25 ff.

⁵⁷ The spreading of dangerous bacteria, for instance, was said at the Geneva Disarmament Conference to be absolutely condemned in the general interest of humanity, either as a method of warfare or as a measure of reprisal. Cf. Castrén 1954, p. 71. In the *Kappler* case the court declared that "it is sufficient to show that in this case the alleged act of reprisal also could not be justified as a reaction against the illegal conduct of the enemy State, since the hostile act had been committed by persons operating at

In any case where an act of war is not justified on the ground of reprisal, it is equally precluded from being argued on the ground of military necessity. Nevertheless, if a belligerent commits an act of war expressly banned from being used as reprisal and his enemy retorts in the same way, the latter cannot legitimately be prevented from exculpating his act on the plea of *tu quoque*.⁵⁸

The argument *tu quoque* was specifically raised by the defense of the Major War Criminals before the International Military Tribunal in Nuremberg. In its broad meaning it meant to exculpate illegitimate acts of warfare committed by one belligerent on the ground that the other belligerent had previously done the same. In specific cases, where the plea of *tu quoque* was confusingly argued on grounds of reprisals, the defence meant to offer the opinion that it is permissible to react on grounds of *tu quoque* in the same manner as by way of reprisals.⁵⁹ The International Military Court, however, rejected the plea of *tu quoque* as an instrument analogous to reprisal.⁶⁰ In the Hostage Trial the following principle was laid down with regard to unlawful reprisals:

Where legality of action is absent, the shooting of innocent members of the population as a measure of reprisal is not only criminal but it has the effect of destroying the basic relationship between the occupant and the population. Such a condition can progressively degenerate into a reign of terror. Unlawful reprisals may bring on counter reprisals and create an endless cycle productive of chaos and crime.⁶¹

their own risk and not belonging to the Italian armed forces, regular or auxiliary." AJIL, 1955, p. 98. Cf. Kunz 1935, p. 35; Smith 1948, p. 133.

In World War II Germany was prevented from justification on the ground of reprisal for treating of four thousand British prisoners similarly to the alleged binding and chaining of German prisoners taken in the Dieppe raid in 1942. Cf. Stone 1954, p. 354.

⁵⁸ On February 17, 1915, a British memorandum declared: "His Majesty's Government consider it would be altogether unreasonable that Great Britain and her allies should be expected to remain indefinitely bound to their grave detriment, by the rules and principles of which they recognize the justice if impartially observed as between belligerents, but which are at the present moment openly set at defiance by their enemy." Quoted from Colbert 1948, p. 181.

⁵⁹ In this sense Smith, 1948, pp. 67/68, remarks that "on both sides action was taken which could not possibly be reconciled even with those rules upon which there had been general agreement. These violations were justified... on the argument of reprisals, which means that illegalities committed by one side justify the other side in the same... departures from the ordinary law."

⁶⁰ "Nach der Rechtsprechung der Nürnberger Militärtribunale kann der Grundsatz *tu quoque* unter zwei Gesichtspunkten betrachtet werden: einmal 'die Tat ist nicht strafbar, weil du dasselbe getan hast' und zum anderen 'weil du und andere dasselbe getan haben ist anzunehmen, dass durch diese Praxis eine durch Gewohnheit begründete Erlaubnis zum *So-Handeln* vom Völkerrecht gewährt worden ist.'" Heinze-Schilling: *Die Rechtsprechung der Nürnberger Militärtribunale*. 1952, p. 123, n. 123.

⁶¹ I.M.T. (green series) vol. XI, p. 1252.

As a rule, international law is interpreted by doctrine and court practice to provide a protective mantle against any abuse of the right. It is certainly to prevent a distortion of the right into a barbarous method of repression that the International Military Tribunal was very reluctant to take into consideration the argument of *tu quoque* as a plea of non-culpability. Yet with regard to certain accusations of illegitimate U-boat warfare, the court recognized the *raison d'être* of the *tu quoque* and admitted it as a plea somewhat similar to that of non-culpability.⁶² Said the court:

In view of all of the facts proved, and in particular of an order of the British Admiralty announced on 8 May 1940, according to which all vessels should be sunk at night in the Skagerrak, and the answer to interrogatories by Admiral Nimitz that unrestricted submarine warfare was carried on in the Pacific Ocean by the United States from the first day that nation entered the war, the sentence of Dönitz is not assessed on the ground of his breaches of the international law of submarine warfare.⁶³

Paragraph 2. *The delimitation between military reprisals and war.*

1. *The historical and doctrinal background of military reprisals.*

Historically, the roots of reprisals as an instrument of international law can be traced back to the Middle Ages when reprisals were considered as a legitimate resort to force by private persons.⁶⁴ The

⁶² In continental legal thinking, the *jus necessitatis* has given rise to a clear-cut distinction between the plea of non-culpability (*Schuldausschliessungsgrund*) and the plea of legitimate defence (*Rechtfertigungsgrund*). This specific continental doctrine is, however, without concern in Anglo-Saxon countries. War crimes under the Nuremberg Charter were comprised by infringement upon the *jus in bello* and the *jus ad bellum*. While the plea of *tu quoque* was categorically rejected for all violations of the *jus ad bellum* it appears that the former is material for departures of certain laws of warfare (*jus in bello*) and may exculpate personal criminality of any such departure. Cf. Glaser 1952, pp. 572-75; Heinze-Schilling 1952, p. 111, n. 116.

⁶³ I.M.T. (blue series) vol. XXII, p. 559. "On 1 October 1939, the British Admiralty announced British merchant ships had been ordered to ram U-boats if possible. In the actual circumstances of this case, the Tribunal is not prepared to hold Dönitz guilty for his conduct of submarine warfare against British armed merchant ships." Ibid., p. 558. Colbert 1948, p. 199, observes with regard to this judgement: "The essence of the German contention at the trial was that these measures had been rendered internationally legal by changed conditions of warfare. Insofar as this contention applied to the sinking without warning of belligerent armed merchant vessels, it appears to have been accepted by the court. It was rejected, however, with regard to the sinking of neutral ships in operational zones". See Kunz 1934, p. 33; Kranzbühler 1950, p. 235.

⁶⁴ For a succinct summary of reprisals, see S. Maccoby: *Reprisals as a measure of Redress Short of War*. Camb. L.J. 1924, pp. 60 ff.

The use of the term 'military reprisal' covers in general all coercive measures short of war, such as 'pacific blockades' or armed intervention resorted to in order to compel another State to 'observe its treaty engagements or to redress illegal acts'. Cf. P.H. Winfield: *The History of Intervention in International Law*. BYB 1922/23, pp. 130 ff.

exercise of reprisals then meant forcible seizure of goods and, in exceptional cases, of persons from those who have made similar seizures unprovoked. Reprisals were only to take place after so-called *lettres de requête*, sent out under the Privy Seal, had been disregarded. The aggrieved party was then to obtain *letters of marque and reprisal* which would authorize him to make reprisals until he had recovered property equal in value to that which had been forcibly taken from him.

In the course of the 18th century, reprisals by private persons as conceived under the legal title of *letters of marque and reprisal* became more and more modified from its original sense and were instead regarded as being tantamount to war. In a sense, the statement of Jefferson, Secretary of State, represented the legal thought of his time when he declared on May 16, 1793:

It is undeniable that at present general letters of marque and reprisal are war to all intents and purposes; that they are never granted but in consequence of an existing war or as a way of making war without formal declaration.⁶⁵

This result was largely due to the increasing part which the centralizing power of the State had begun to play in all spheres of national life. Such a state of things was bound to reinforce the movement for the definite abolition of *letters of marque and reprisal*, especially in trading community of the type of Holland, whose merchants always possessed large stocks of goods in foreign ports and at sea, particularly exposed to seizures.⁶⁶ Since the 18th century, the right of reprisal was more and more conceived as belonging to the sole prerogative of the State.

Recourse to it was justified

only in cases of violent injuries directed or supported by the State and justice absolutely denied by all tribunals and afterwards by the 'Prince'.⁶⁷

In fact, the characteristic feature of the 19th century reprisal is that it was used exclusively by major powers against small nations. There is no evidence to the contrary.⁶⁸

The objection sometimes made to reprisals, that they are applicable only to the weaker Powers, since a strong Power would at once treat them as acts of war, is indeed the strongest recommendation

⁶⁵ Moore, *Digest*, vol. VII, p. 122.

⁶⁶ Holland 1916, p. 13.

⁶⁷ Duke of Newcastle in a despatch addressed to Frederic II of Prussia in 1751. From E.T. Holland: *Studies in International Law*. 1898, pp. 131.

⁶⁸ Up to the 18th century, reprisals were in fact practised against the greatest Powers without necessarily implying war. Frederic II of Prussia, for instance, practised reprisals against both Russia and England, while England undertook reprisals against Spain, then a first class Power. "Since the middle of the 19th century, however, formal reprisals against a great Power are universally felt to be impossible." Butler-Maccoby 1928, p. 181.

of this mode of obtaining redress. To localize hostile pressure as far as possible, and to give to it such a character as shall restrict its incidence to the peccant State, is surely in the interest of the general good.⁶⁹

Owing to the confidence in the superiority of the force which the Great Powers could bring to bear in the 19th century, their legal doctrines took it for granted that the State against which they have proceeded by armed reprisal "will quickly bow to the logic of facts and, not making a difficulty of his wounded dignity, will hurry on to concessions in order to secure relief from the measures of coercion".⁷⁰

The signing of the Third Hague Convention of 1907 relative to the opening of hostilities gave new rise to inquiry as to how the opening of reprisals was to be distinguished from the opening of hostilities as had been regulated by this Convention.⁷¹ There was nearly common agreement among its framers that this Convention did not cover hostilities if termed 'military reprisal'. This predominant opinion was formulated by Westlake in a letter to *The Times* published on December 24, 1908. He made it clear that the term 'hostilities' in the Third Hague Convention of 1907 "must be read as meaning all objective acts of force by the other party, and that a tacit reservation is implied of pacific blockade and reprisals in time of peace as known cases".⁷²

A similar point had been under discussion with regard to the Second Hague Convention of 1907 respecting the limitation of the employment of force for the recovery of contract debts.⁷³ How far did this agreement not to resort to armed force prevent the exercise of a right to take reprisals? Here, insofar as reprisals involve the use of 'armed force',

⁶⁹ Holland 1916, p. 13: cf. Kunz 1935, p. 7. Holland's 'moral' justification of the legal instrument of reprisal has remained very controversial in doctrine. Eagleton 1933 p. 281, remarks with regard to reprisals that "the illusion that they are measures of securing justice disappears when one considers their application by a weak state against a strong state." Despagne, referring particularly to the Pacifico reprisal and a British reprisal in 1862 says: "Au point de vue du droit des gens, une grande puissance abusant de sa force envers un pays incapable de résistance, se donne tous les avantages de la guerre sans assumer les responsabilités que celle-ci entraîne soit à l'égard du pays attaqué, soit à l'égard des Etats neutres." Quoted in Butler-Maccoby 1928 p. 182.

⁷⁰ Butler-Maccoby 1928 p. 181.

⁷¹ Cf. Stödter 1948 p. 105.

⁷² Holland 1916 p. 19: "The term 'reprisal'", concludes the author, "has now come to cover, and it is the only term which does cover generically, an indeterminate list of unfriendly acts, such as embargo, pacific blockade, seizure of custom-houses, and even occupation of territory, to which resort is had in order to obtain redress from an offending State without going to war with it. The pressure thus exercised, unlike the unlimited *licencia laedendi* resulting from a state of war, is localised and graduated. It abrogates no treaties, and terminates without a treaty of peace. It affects only indirectly, if at all, the rights of States which take no part in the quarrel."

⁷³ See above p. 96.

it is generally held that its exercise is incompatible with the very words of the Convention.⁷⁴

Among the publicists a few voices were heard pleading for a synonymy of military reprisal and war.⁷⁵ By the opening of the 20th century, this topic was discussed predominantly on the Continent, since Anglo-Saxon writers had increasingly got used to resorting to the axiom of *measures short of war* which they thought to be conclusive for the *delimitation of war and reprisal*.⁷⁶

The State practise of the 19th century followed by and large the line which had been formulated in *Bishop v. Jones and Petty*.⁷⁷

Reprisals... are forcible measures of redress but do not *per se* constitute war. Hostile attacks and armed invasions of the territory of jurisdiction of a nation, accompanied by the destruction of life and property by officers acting under the sanction and authority of their governments, however great the provocations to war, are often atoned for and adjusted without its ensuing. War in its legal sense has been aptly defined to be the state of nations, among whom there is an interruption of all pacific relations and a general contestation of arms authorized by the sovereign.

It goes without saying that the delimitation of war and armed reprisal cannot be drawn by any factual criterion.⁷⁸ It is essentially a matter of legalistic construction which became workable owing to the fact that it was sustained by the great powers of the 19th century which applied it only against small States. For the most part, small States yielded to the armed pressure of the great powers and accepted military reprisals as non-warlike. Exceptional were the French reprisals against Mexico which were eventually met by Mexico with declarations of war both in 1838 and 1861.⁷⁹ Armed reprisals are liable to operate within

⁷⁴ Cf. Sir John Fischer-Williams: *Chapters on Current International Law*. 1929 pp. 257 ff.

⁷⁵ To this effect, Nys 1912/II p. 587: "Il est impossible de considérer comme de simples représailles des actes de véritable hostilité. Il faut dire que lorsque l'exécution de mesures exige le concours des forces militaires ou maritimes et entraîne une série d'opérations violentes, il y a guerre." See also Funk-Brentano and Sorel: *Précis du droit des gens en temps de paix*. 1877, vol. II, ch. XII, p. 229. For a compilation of authors of the 19th century pleading for a synonymy of war and armed reprisal, see P. Wagner: *Zur Lehre von den Streiterledigungsmitteln des Völkerrechts*. 1900, p. 67.

⁷⁶ Jessup AJIL 1954 p. 100 rightly observes that it does not seem to have been particularly helpful to have discussed certain situations as non-amicable modes or redress short of war. "The difficulty seems to arise from the legal necessity of fitting every situation into one of the two traditional categories of peace and war."

⁷⁷ 28 Tex. 294 (1886).

⁷⁸ A close examination on this issue has been made by A. Cavaglieri: "Note critiche su la teoria dei mezzi coercitivi al di fuori della guerra." *Rivista di diritto internazionale* 1915, pp. 23 ff., 305 ff. See also Gottschalk, ZfV 1933 pp. 194 ff.; Kuei 1945 p. 22; Heyns 1938 pp. 18 ff.; Keller 1934 pp. 18 ff.

⁷⁹ Cf. Colbert 1948 p. 99; see also Hogan 1908 pp. 12/13.

the framework of peaceful relations and can be differentiated from measures of war so long as the executing government can expect that its action will not be taken by the other as having produced the legal state known as war. But the fact of war or no war does not depend on the hope of the government which undertakes the reprisal, but on the intent of either party to the dispute. Hence, what distinguished an armed reprisal at the opening of the 20th century from a state of war was the lack of *animus belligerendi* on either side.⁸⁰ This absence of *animus belligerendi* was in practice demonstrated by the fact that diplomatic relations between the disputant States usually continued and that trade, commerce and communication between the disputant States were generally upheld. Suffice is to say that in the absence of a state of war questions of neutrality could not arise.⁸¹

II. *The League of Nations facing reprisals.*⁸²

In a framework of international organization, such as the League of Nations, the necessity of keeping the demarcation line between peace and war unblurred was felt from the very day of its carrying into effect. Article 10⁸³ provided for the maintenance of the new political order created under the League and its guarantee was thought to be rendered effective in its Article 16 often referred to as 'Sanction Article'.⁸⁴ But whatever the spirit of the Covenant might have been, it was felt from the beginning that the letter of it did not preclude every resort by members of the League to acts of force by way of reprisals without the preliminary attempts at pacific settlement which under the Covenant must precede a resort to war.

How to fill the *lacuna* thus left was the object of innumerable discussions within the League, the question hinging mainly on the relationships between military reprisal, act of war and state of war. The relevance of these terms was mainly examined under the following aspects :

(1) Does a unilateral act such as is termed 'armed reprisal', automatically constitute an 'act of war' as provided in Article 16?

(2) Are 'state of war' and 'act of war', as used in the Covenant, synonymous? If not, what are the distinctive criteria between them?

⁸⁰ See Butler-Maccoby 1928 p. 182; Holland, *op. cit.* 1916 p. 13; O. Oncken: *Die politischen Streitigkeiten im Völkerrecht.* 1936 pp. 49 ff. makes the *animus* of the State the decisive criterion for the legal evaluation of political disputes. For a critical view, see Guggenheim Lehrbuch II p. 589.

⁸¹ See Hindmarsh 1933 p. 96; Keller 1934 pp. 22/23.

⁸² Sir John Fischer Williams: *Some Aspects of the Covenant of the League of Nations.* 1934 pp. 103 ff. and *The Covenant of the League of Nations and War.* Cambridge L.J. 1933 pp. 1 ff., reprinted with slight modifications in *op. cit.* 1934 pp. 292 ff.; H. Lauterpacht: *Resort to War and the Interpretation of the Covenant during the Manchurian Dispute.* AJIL 1934 pp. 43 ff.; J.L. Briery: *International Law and Resort to Armed Force.* Cambridge L.J. 1932 p. 308; Eagleton 1938 p. 406.

(3) Is an 'act of war' characterized by its material element of armed coercion or by the subjective criterion of the intention to wage war?

These topics occupied the League of Nations until its decline. They were at the bottom of nearly all of the controversies relating to reprisals, blockade, armed intervention and other coercive measures.

The element of intention, however, could not any longer determine by itself the legal character of armed coercion in the event that the latter interfered with the rights of third States.⁸⁵ On the whole, it can be said that embargo, occupation and bombardment, even when they affected the persons or property of nationals of third States did meet with little or no protest and third States remained rather indifferent as to whether such forcible acts had been affected by way of armed reprisal or by war. But enforcement of a blockade, especially if any attempt was made to proceed against vessels of third States not only by way of visit and search, but also by condemnation of the ship, brought protests from third States if any such blockade was said to constitute no more than a military reprisal. The blockade of Venezuela in 1902 gives evidence to the effect that a State remained free to qualify acts of military coercion 'reprisal' only so long as it did not interfere with the rights of third States.⁸⁶ If nevertheless it did, then its military coercion could constitute no less than war.

Summary: At the opening of the 20th century, the legal evaluation of acts of force in terms either of military reprisal or of war was determined as follows:

(1) Acts of military coercion were liable to be argued on grounds of reprisals if neither of the contending parties acted with *animus belli-gerendi*.

(2) Actual war was held to occur under international law if the measures of military reprisal were considered by the affected State

⁸³ Article 10: The Members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all Members of the League. In case of any such aggression, the Council shall advise upon the means by which this obligation shall be fulfilled.

⁸⁴ Article 16: Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other Members of the League, which hereby undertake immediately to subject it to the severance of all trade or financial relations, the prohibition of all intercourse between their nationals and the nationals of the covenant-breaking State...

⁸⁵ Eagleton 1933 p. 243.

⁸⁶ Holland 1916 p. 15, who observed with regard to that event: "Great Britain will be at war with Venezuela if the latter should choose to treat the British acts of coercion as acts of war -no matter whether they were intended only by way of reprisals."

as 'acts of war' and resisted accordingly.⁸⁷ No precise particulars, however, were furnished as to whether the resistance of the affected State had to consist in a declaration of war, or only in a factual resistance by force, or in both of them.

(3) Military reprisals were supposed to bring about a state of war if the coercive measures involved any interference with the rights of third States, so that their national interests could be said to be seriously affected.

In order to fill the gap with regard to the so-called pacific blockade, the Council of the League started by deciding upon the formation of an 'International Blockade Commission'.⁸⁸ This Commission was charged to examine in general the application of Article 16 of the Covenant. In particular, their assigned task with regard to blockade was formulated as follows:

The first question to be decided, under this heading, is whether the Economic Blockade is or is not a war measure. A breach of the Covenant in the sense of Article 16 is regarded as constituting an act of war, but it is not laid down that this act of war creates an actual state of war. If the blockade be considered as a war measure, should international law of blockade be applied?⁸⁹

⁸⁷ Calogeropoulos 1950 p. 78: "La détermination des limites entre la guerre et les représailles de nature militaire fut de tout temps difficile, étant donné que la réponse aux représailles par des représailles contraires, signifiait la guerre au sens juridique du mot, entraînant par la suite l'application des règles spéciales du droit de la guerre."

⁸⁸ This Commission consisted of 8 members of whom 4 were to be selected from States which were permanently represented on the Council. The other four were chosen from Cuba, Spain, Norway and Switzerland.

⁸⁹ The strong belief at the outset of the League in the efficient function of the Covenant for the outlawry of war caused the members of the League to adapt their terminology to the situation. Accordingly, at the beginning of the League, the phrase 'economic weapon' had been employed as a kind of substitute for 'war'. Moreover, there was very strong wishful thinking that the position of the State members, particularly in economic sanction or in military measures enforcing the provisions of the Covenant, should be considered as a status distinct from belligerency and neutrality. See Komarnicki RdC 1952/I p. 434; Eagleton 1933 p. 245.

O.J. 1921 p. 431, paragraph B, where the carrying into effect of the Blockade is dealt with. It became very soon evident, however, that the interpretation of the Sanction Article could not be dealt with other than in terms of war. MM. Motta (Switzerland) and Negulesco (Romania) put quite bluntly the phrase of 'economic weapon' to the following trial: "Le blocus de l'art. 16, est-il une mesure de guerre, les dispositions du Traité de Paris de 1856 lui sont-elles applicables, y a-t-il lieu à notification de la date du commencement du blocus et de la zone de ce blocus, doit-on respecter la propriété des neutres?"

A. 1920, C. VI, p. 330. As a consequence, the International Blockade Commission was charged to inquire whether "the blockade can only be applied after diplomatic notification to the blockaded State? Must it be effective in the technical sense of the word? Will private property be exempt from seizure, and if so, to what extent? To what extent will traditional definition of contraband hold good? What will be the effect of a breach

The question of when war existed under the League was on the one hand closely linked up with that of under what conditions the Covenant had been violated. On the other hand, it was dependent upon the meaning which the League was willing to attribute to the term "act of war". The interpretation of Article 16 constituted, therefore, the crux of the problem and was incidental to the existence of war under the Covenant. The reply of the Blockade Commission, which was adopted by the Assembly of the League at its second meeting on October 4, 1921, was, therefore, of great importance:

The unilateral act of the defaulting State cannot create a state of war: it merely entitles the other members of the League to declare themselves in a State of war with the covenant-breaking State; but it is in accordance with the spirit of the Covenant that the League of Nations should attempt, at least at the outset, to avoid war, and to restore peace by economic pressure.⁹⁰

This resolution, which was of high authority, seems at a first glance to be contradictory to what the Blockade Commission had reported in August 1921 to the Council:

By the terms of the Covenant, a State which resorts to war against a State Member of the League, in violation of the provision of Articles 12, 13 and 15, i.e., which undertakes armed action against that State, is regarded as having committed an act of war against all the Members of the League.⁹¹

The compatibility of both statements is only explicable by the fact that they are products of a transitional period. The framers of the Covenant had had in mind a purely objective test for the determination of their phrases 'resort to war' or 'to go to war'. Accordingly, the term 'act of war' was understood in the sense of an act constitutive *de jure* of a state of war.⁹² That is, an act of war was originally under-

of blockade? Will neutrality be recognized and, if so, to what extent? If the blockade is not a war measure, should the law and practice of pacific blockade be applied? If not, what rules should be followed?" On the function of the International Red Cross with regard to blockades and military actions undertaken in pursuance of Art. 16 of the Covenant see Brown Rev. I. Croix Rouge 1934 pp. 382/83.

⁹⁰ Resolutions and Recommendations adopted by the Assembly, Second Session, 1921, p. 23; See also 2nd Assembly (1921), 3rd Committee, p. 286 and O.J. 1927 p. 840.

⁹¹ League of Nation's Publications: A. 28 (b), 1921, p. 76; A. 14, 1927 V, p. 17.

⁹² D.H. Miller: *The drafting of the Covenant*. 1928 vol. II p. 80, declared that Article 16 was regarded to provide "for an *ipso facto* war by all the other members of the League upon the covenant-breaking State." Oddly enough, that author saw the inconveniences of such a meaning of Article 16 in the first place with regard to the Constitution of his country: "A substantial objection to such a provision is that it would be void if contained in a treaty of the United States, as Congress under the Constitution has the power to declare war. A war automatically arising upon a condition subsequent, pursuant to a treaty provision, is not war declared by Congress."

stood as bringing about automatically a state of war. It is on this juridico-political background that M. de Brouckère was wrong when he called the statement, that the unilateral act of one State cannot create a state of war, 'a truism'. What the Blockade Commission meant to say above all in the resolution of October 4, was to mark the change from the purported objective test towards a subjective test in the determination of war. Instead of obliging the Members of the League to consider acts of military coercion, such as armed reprisal, armed intervention or blockade as the initiation of a state of war, it was decided that "it is the duty of each Member of the League to decide for itself whether a breach of the Covenant has been committed".⁹³

The change from the objective test to a subjective test of war had been strongly supported by the great powers. Yet its incompatibility with an effective outlawry of war was only too strongly felt. An expedient was thought to be found in an amendment to Article 16 to the effect that "it is for the Council to give an opinion whether or not a breach of the Covenant has taken place".⁹⁴ Since there was little chance of carrying this amendment through (it was, indeed, never adopted), it was agreed upon that the amendment to Article 16 of the Covenant should be regarded meanwhile as 'rule for guidance'.⁹⁵

The change from the objective test to a subjective test which came about in the declarations of the League in 1921 had its impact upon the interpretation of the term *act of war*. Henceforth, a distinction was said to exist between the meanings of 'act of war' and 'state of war'.⁹⁶ While the latter implied the existence of war, the former did not. 'Act

⁹³ The settlement of the concept of war under the League was hampered and even diverted by a conflicting political tendency which was to consider war and the use of force a situation to be eliminated by procedures of discussion and conciliation in the organs of the League, by virtue of Article 11 and in complete disregard of Article 16. This tendency implied a marked rejection of being committed to any authoritative concept of war.

⁹⁴ Eagleton 1933 p. 243.

⁹⁵ O.J. 1928 p. 678. "The amendments to Article 16, adopted in 1921, weakening the 'automatic' obligations imposed by that article, were not ratified by the Members, but were kept as 'directives' and applied in practice." Pompe 1953 p. 44 with reference to the Memorandum on Articles 10, 11 and 16 of the Covenant by J. Rutgers, LoN Documents of the Preparatory Commission for the Disarmament Conference, Series VI C. 165. M. 50, 1928, Series IX pp. 142-158.

⁹⁶ The statement of M. Schanzer in this respect may be regarded as some form of comment upon the Resolution of October 4: "La commission du blocus a souligné la distinction entre l'acte de guerre et l'état de guerre. L'acte de guerre de l'Etat en rupture de Pacte donne sans doute le droit à tous les membres de la Société de procéder à des actes de guerre contre cet Etat et même de se déclarer en état de guerre qui d'ailleurs pour la plupart des membres de la Société serait une simple fiction. Votre Commission a partagé cette manière de voir. L'idée fondamentale qui inspire le Pacte est d'éviter les guerres." A. 1921 C. III p. 383. Cf. also Wehberg FW 1938 p. 145, who erroneously sees in the report of the Blockade Commission of August 1921 an equation of armed force and war; Fischer-Williams 1934 p. 308 and BYB 1936 p. 142.

of war' was now interpreted in the sense of an act of military coercion which by its very nature was liable of constituting a state of war, but which needed the election of at least one of the Members of the League (the peccant State included) to that effect in order to bring about a state of war. The Member-States of the League, it was added, could not declare themselves to be in a virtual state of war unless the peccant state persists in its attitude.

It is obvious that the evolution of the legal thought about war under the League in the early 1920's gave strong support to the maintenance of the distinction between armed reprisal and war. The efforts for an equation of the meaning of 'acts of war' with that of military reprisals were put to trial in 1923 when Italy bombarded and seized the island of Corfu by way of securing reparation for the murder of General Tellini in Greece. A Committee of Jurists, which the Council appointed after the Corfu incident, was called upon to give an advisory opinion to the following question:

Are measures of coercion, which are not meant to constitute acts of war consistent with the terms of Articles 12 to 15 of the Covenant when they are taken by one Member of the League of Nations against another Member of the League without prior recourse to the procedure laid down in those articles?

The answer of that strong body of jurists was formulated in the following terms:

Coercive measures, which are not intended to constitute acts of war may or may not be consistent with the provisions of Articles 12 to 15 of the Covenant, and it is for the Council, when the dispute has been submitted to it, to decide immediately, having due regard to all the circumstances of the case and to the nature of measures adopted, whether it should recommend the maintenance or the withdrawal of such measures.⁹⁷

This statement, which is of singular weight by reason of its authorship, has unfortunately all too often been declared to constitute an answer without meaning, to be of enigmatic character or at least to bear all the features of an *umbrella statement*.⁹⁸ Yet its clearcut meaning comes out if it is considered with due regard to the juridico-political tendencies at the outset of the League in its determination of war. The admittedly evasive wording of the answer may be explained by the reluctance of States to put legal customary conceptions in the form of written statements. It is also the outcome of the strong divergencies within the

⁹⁷ O.J. 1924 p. 523. Ch. De Visscher: *L'interprétation du Pacte au lendemain du différend italo-grec*. RDILC 1924 pp. 387/88.

⁹⁸ A.D. McNair: *The legal meaning of war and the relations of war to reprisals*. Grotius Transactions 1925 p. 45; Eagleton 1933 pp. 247; Wehberg FW 1938 p. 146.

Committee of Jurists on the subject-matter.⁹⁹ The essence of the answer can be summarized as follows:

1. As a rule, the subjective test is to be applied for the existence of war in that sense that an act of force must either be committed with *animus belligerendi* or, if not committed with *animus belligerendi*, must be declared by one of the Member-States to constitute an act of war. Coercive measures, such as acts of military force, do not legally qualify themselves as acts of war by their bellicose character, but only by the intention to that effect of one of the Member-States, in the first line of the State which has recourse to them. That is to say, they must be judged: *non ex re sed ex nomine*.¹⁰⁰

2. The competence of any such judgment, which was declared in 1921 to belong predominantly to the Member-States, was tried to be shifted to the Council of the League. In the event that the Council of the League was called upon to pronounce itself on the warlike character of a military coercive measure, it was entitled to disregard dissenting opinions which might have been expressed on the subject-matter by Member-States in their individual capacity and to bind them by the opinion which the League took in its own capacity. In practice, however, the impact of the answer in this respect was modified insofar as the Member-States were called upon to vote an eventual finding by the League of an existence of war. Moreover, emphasis is laid on the fact that the Council is free in its finding to apply the subjective or objective test as it pleases.¹⁰¹

⁹⁹ Protests against this authoritative statement came rather from the small States; none of the Great Powers expressed dissatisfaction with the answer of the Committee of Jurists.

¹⁰⁰ Lauterpacht AJIL 1934 p. 54 gives the following interpretation: "Members of the League are entitled to assume 'resort to war' in regard to hostilities not accompanied by an *animus belligerendi*, which are taking place between other members of the League. They may do it when circumstances of which they alone are judges seem to them to warrant such a conclusion. They need not do it if they are not of the opinion that circumstances justify an exercise of discretion in this direction. This is in effect the meaning of the much quoted pronouncement of the Committee of Jurists." To the same effect, Pompe 1953 pp. 9/10. See also the reply from Switzerland O.J. 1926 pp. 610/11.

¹⁰¹ The statement of the Committee of Jurists has been severely criticized ever since by experts in international law and gave rise to a very strong movement in favour of the opinion that measures of coercion not called war by the peccant State are at any rate illegal under the Covenant. In the 'campaign' against the legitimacy of armed reprisal under the Covenant, Charles de Visscher, who was himself one of the Committee of Jurists, had furnished a striking argument which was time and time again repeated by publicists. De Visscher held that the legitimacy of military reprisal was absolutely condemned by the Covenant. In support of his opinion, de Visscher pointed out that if a State were still allowed to engage legitimately in reprisals against another State, it would just be the armed resistance of the latter which constituted a violation of the Covenant, a point of view which evidently could not be admitted. See de Visscher: *L'interdiction du Pacte au lendemain*

So far, the Covenant had in fact brought about an evolution of the traditional concept of the existence of war which was integrally subjective. Henceforth, an act of force of a Member-State which was justified on the ground of armed reprisal could be declared by the Council to constitute war. In practice, however, only once the Council made use of its competence to apply the objective test.¹⁰² That occurred in the Italo-Ethiopian conflict in 1935, when the coercive measures of Italy in Ethiopia were declared to constitute war in spite of Italy's defence that it was only armed reprisals.

The competence of the Council in its finding upon war, which was laid down in 1923, is somewhat of the nature of an exception to the rule which was reasserted in 1927 in a report of the Secretary-General:

From the legal point of view, the existence of a state of war between two States depends, upon their intention and not upon the nature of their acts.¹⁰³

When France occupied in 1923 the Ruhr district, no question of the application of sanctions against Germany by the League, under Article 16, had been raised. Germany had violated a treaty, but she had not 'resorted to war'. The action of the French Government which was styled 'armed reprisal', i.e. launched without *animus belligerendi*, was neither met with *animus belligerendi* on behalf of Germany, nor did it

du différend Italo-Grec. RDILC 1924 pp. 213-230, 377-396; at p. 384: "Le droit international général laisse du moins à l'Etat, victime de représailles soi-disant pacifiques, le droit d'y riposter par une déclaration de guerre immédiate. Sous l'empire du Pacte, au contraire, on se trouverait conduit à considérer celle-ci comme illicite: par le plus étrange renversement des rôles, c'est la victime des actes de violence et non leur initiateur responsable qui, considérée comme l'auteur d'une guerre injuste, tomberait sous le coup des sanctions collectives édictées par l'article 16 du Pacte." To the same effect, C.G. Ténékidès: *L'évolution de l'idée des mesures coercitives et la S.d.N.* RDILC 1926 pp. 410/11; Fauchille 1926 vol. I, part. III, p. 696; Politis: *Les représailles entre Etats membres de la S.d.N.* RGDIP 1924 pp. 5 ff. asserts that every act of violence is an act of war which causes peace to disappear. See also Eagleton 1933 p. 281; E. Borchard: *War and Peace.* AJIL 1933 p. 114; Ray 1930 p. 527; Baty AJIL 1936 p. 395; Hambro 1936 p. 58.

¹⁰² Pompe 1953 p. 19 holds that none of the organs of the League ever made use of that competence when the state of war was not admitted by the belligerents: "In all these cases, a state of war would be called into existence in a very limited sense; it could be said that such a state of war was derivative of the classic state of war. A state of war would exist in view of certain limited consequences only, be it the establishment of neutrality relations between a third State and the conflicting parties for the application of certain Articles of the Convention and the obligation of Member-States to fulfill the duties incumbent on them in virtue of these Articles. The war existing in the latter case is a concept proper to a particular 'international legal milieu' which, though it was meant to be universal did not extend to the society of States ruled by international customary law. Due to the practices of the League of Nations, this concept was not developed outside the sphere of abstract commission reports and discussions of legal experts." pp. 19/20.

¹⁰³ O.J. 1927 p. 834 Annex 964; E. Kaufmann: *Règles générales du droit de la paix.* RdC 1935/IV p. 606.

cause a Member-State of the League or the Council itself to consider it as an act of war. The measures of coercion could, therefore, bring about no state of war.¹⁰⁴

The line reaffirmed in 1927 by the Secretary-General was particularly taken by the Council with regard to Japan's military action against China in the 1930's, in spite of the persuasive and emphatic statements which were made at the time upon the floor of the League Assembly by numerous States which pleaded for the exclusivity of the objective test in the legal determination of war.¹⁰⁵ Their efforts met with no success. When later on the League applied the objective test in the Italo-Ethiopian conflict, it did not, however, carry through all the consequences of such a decision. Proposals for a forcible intervention in the Ethiopian war, such as the interruption of communications between Italy and Africa — the so-called 'closing of the Suez Canal' — had been brought forward by several members of the League. Yet it was held that warlike reaction against a covenant-breaking State is optional for the League and its members, not compulsory.¹⁰⁶ Certain rules of war and neutrality which were in no direct conflict with the enforcement action taken by the League under Article 16 were thought to be applied as a matter of convenience or policy, though not of legal obligation.

The whole practice of the League with regard to the maintenance of a distinction between war and armed reprisal is full of inconsistencies which mark the transitional period towards an abolition of that distinction.¹⁰⁷ Moreover, the distinction between war in the material sense and war in the formal sense is increasingly emphasized.¹⁰⁸ Under the League, the legitimacy of armed reprisal was no longer proclaimed in terms of international law. It goes without saying that thereby the League was relieved of tracing the borderline between war and reprisal. The maintenance of that distinction was rather due to the change of

¹⁰⁴ Q. Wright: *The Rhineland Occupation and the Enforcement of Treaties*. AJIL 1936 p. 491; E.S. Colbert: *Retaliation in International Law*. 1948 p. 101.

¹⁰⁵ Records of the Special Assembly convened in virtue of the Article 15 at the request of the Chinese Government, I. See the position taken by Colombia, Uruguay, Panama, Haiti, Bolivia which represented the well-known South-American viewpoint. For the European countries, see the speeches delivered by Denmark, Sweden, Switzerland and Czechoslovakia which all denied the right of a Member-State to take military reprisals under the League. Wehberg FW 1938 p. 145.

¹⁰⁶ Fischer Williams BYB 1936 p. 141.

¹⁰⁷ C. Schmitt: *Inter pacem et bellum nihil est medium*. ZADR 1939 p. 594, criticizes this transitional period in the following terms: "Für den Genfer Pazifismus und sein Kriegsverhütungssystem ist es kennzeichnend, dass er aus dem Frieden eine negativ bestimmte juristische Fiktion macht: Friede ist alles, was nicht Krieg ist. Der Kriegsbegriff aber ist so problematisch geworden, dass ein derartig negativ bestimmter Friede nicht mehr als ein trauriger Betrug ist."

¹⁰⁸ Taubenfeld: *International Armed Forces and the Rules of War*. AJIL 1951 p. 672. Hindmarsh 1933 p. 12 rightly observes that "it is hardly to be expected that a lasting world peace structure can be founded on a basis so limited as the prohibition of a legal status of war while practically all the concrete evils associated with that status are allowed to continue."

interpretation which occurred in the early 1920's with regard to the term 'act of war'. Although no explicit statements upon the admittance of armed reprisal have ever been made under the League, their eventual toleration can easily be derived from the guiding principles which were outlined in 1927:

Measures of coercion, however drastic, which are not intended to create and are not regarded by the State to which they are applied as creating a state of war, do not legally establish a relation of war between the States concerned. This would seem to be the case if, as is suggested to be possible under point (c) below, third States find it necessary to guide their own conduct by the view that a state of war existed. There is no general rule of international law under which application of the economic sanctions would automatically produce a state of war.¹⁰⁹

SECTION 3. THE ACT OF WAR. ITS CHANGE OF LEGAL MEANING SINCE THE "JUS PUBLICUM EUROPAEUM".

An investigation into the practice of the term 'act of war' constitutes, besides the approaches from neutrality and the delimitation of war and reprisal, a useful verification of the modern concept of war, i.e., its development from *the* legal concept of war under the state-of-war doctrine to a relative concept of war in the formal and material senses.

In the province of international law, the meaning of the phrase 'act of war' is supposed to be exclusively derived from the legal concept of war. Accordingly, it is of no use to take account of the different meanings which may be ascribed to that phrase in sociology or philosophy.¹¹⁰ The evolution of that term is exclusively to be studied in treaties of defensive alliances, in pacts of non-aggression and in international conventions relative to the prevention of war.

The particular interest of an investigation into the evolution of the phrase 'act of war' consists in that it helps to clarify the legal trichotomy of formal war, material war and acts of force short of war, the latter of which has not been abrogated by the concept of war in the formal and material senses.

Paragraph 1. The original meaning of the term "act of war".

In contemporary legal doctrine, the term *act of war* is used with various meanings, hence its exact legal meaning is left to controversial interpretation. The term, although very often used in weighty legal arguments with regard to the legitimate employment of force, has on

¹⁰⁹ J.O. 1927 p. 834.

¹¹⁰ The following assertion of Rumpf ArchivVR 1950 pp. 44/45, is, therefore, not defensible in international law: "Im Sinne sowohl der hergebrachten Völkerrechtslehre als auch von Clausewitz ist jede "Zerstörung des Kriegspotentials" selbst ein Kriegsakt. Es ist forgesetzte Politik, fortgesetzter Krieg."

but few occasions attracted the attention of internationalists for purposes of definition.¹¹¹ An analysis of the term 'act of war' both in its historic evolution and its use in the State papers and judicial decision evidences that it has paved the way for admitting the relevance of material war in the province of international law.

At the outset of the *jus publicum europaeum*, the term *act of war* was no doubt used primarily in the sense of a military act undertaken in time of war.¹¹² Although the state of the law of war at that time was rudimentary, the belligerent's mind was no less than to-day preoccupied by the question as to whether a specific act of war was treacherous, permissible or lawful. The essential feature of the original meaning of *act of war* is that it identified the use of force within a war already in progress. Consequently, when used with regard to the initiation of war, it implied the idea that an act of war, by definition, has brought about a state of war. It is in this classic sense that the court declared in the *Hartman case* :

In law, an act of war is an act of defence or attack against the enemy.¹¹³

This classical meaning, when employed in legal disputes upon the commencement of war, remained very often comprehensible only by way of a legal fiction, namely that an act of war constitutive of a state of war is tantamount to an act of war occurring during a state of war.¹¹⁴

¹¹¹ Clyde Eagleton: *Acts of war*. AJIL 1941 p. 321 remarks that "a search of authorities is disappointing. The term is not to be found in the index of a dozen or more texts of international law, including Moore's *Digest*; it is not listed in Calvo's *Dictionnaire*, nor in Strupp's *Wörterbuch*, nor in the *Dictionnaire Diplomatique*." See W. Steinlein: *Der Begriff des nicht herausgeforderten Angriffs*. 1927.

¹¹² For a pertinent modern work, see Mosler: *Die Kriegshandlung im rechtswidrigen Kriege*. JahrbuchiaöR 1948 pp. 335 ff. where it is concluded (p. 355): "Die Untersuchung der Theorie und der Staatenpraxis hat ergeben, dass die Kriegshandlung auch im rechtswidrigen Kriege völkerrechtlich zu qualifizieren ist. Sie darf vom Kriegsgegner nicht strafrechtlich verfolgt werden. Das Völkerrecht kennt eine derartige Ermächtigung an den rechtmässig kämpfenden Staat nicht. Die Kriegshandlung ist kein Kriegsverbrechen". Cf. Goodhart 1940 pp. 21 ff.; Stone 1954 pp. 562 ff.

¹¹³ Hackworth Digest VI p. 176. Rousseau 1953 p. 538 calls the original meaning of the term *act of war* its technical aspect, which he specifies as follows: "Dans cette acception technique, l'acte de guerre est un acte accompli par un Etat dans l'exercice de ses droits de belligérance." As it was expressed in the *British Eastern Extension Australasia and China Telegraph Company* by the Attorney General of the United States, acts of war in this sense may be comprised by damages to property of a neutral permanently situated within the territory of the enemy. In that case, the cutting of neutral cable was maintained to constitute a lawful act of war and therefore no compensation could be due for such damage. See U.S. Naval War College 1904 p. 194.

¹¹⁴ It is, for instance, the practice of the United States to proclaim in its declarations of war that a state of war already existed, because of acts of war committed by the other party. See H. Briggs: *The Law of Nations*. 2nd ed. 1953 p. 974, with references to 9 Stat. 9 (1846); 50 Stat. 364 (1898); 40 Stat. 1 (1917); see also *The Parkhill* 18 Fed. 10, 755 (1861) which refers to the initiation of the Mexico-American War in 1846.

With regard to acts of war performed after the status of war has come into being, references are to be found in the first line in Hague Convention IV for the conduct of war, and in questions concerning the responsibility of a belligerent for illegal acts. Moreover, the original connotation of the term *act of war* had been relevant in military alliances and defense treaties anterior to World War I insofar as the event 'attack' or 'aggression' was under consideration. Here, a distinction had grown out between *casus foederis* and *casus belli*. While the former was in the nature of an act of war, the latter gave only a legitimate cause of initiating war.¹¹⁵

In the Treaty of the three Emperors of July 18, 1887, signed by Austria-Hungary, Germany and Russia, a specific act was stipulated to constitute an act of war and therefore liable of bringing out *ipso facto* a state of war. Article III of this Treaty stipulated the closing of the Straits of the Bosphorus and the Dardanelles which was declared to be a principle rooted in international law. An obligation was imposed on Turkey to respect this principle with regard to all Powers. In the event of Turkey's infringing this principle, she is declared to have committed an act of war automatically establishing a state of war between the Sublime Porte and the High Contracting Parties.¹¹⁶

An instance in the same sense, but in its negative form, can be found as late as in the Peace Treaty of Versailles on June 28, 1919. In its Part VIII, Section I, Annex II, Paragraph 18, it is determined that the measures which the Allied and Associated Powers shall have the right to take in case of voluntary default on the part of Germany, and which

Germany agrees not to regard as acts of war, may include economic and financial prohibitions and reprisals and in general such other measures as the respective Governments may determine to be necessary in the circumstances.

¹¹⁵ In the diplomatic correspondence between the German Confederation and Great Britain dealing with the Federal Execution in Holstein, it was pointed out that "there was no desire on the part of Germany to provoke a war, that so grave a responsibility would rest with Denmark, if she chose to construe a Federal act of purely legal character into a *casus belli*." *Fontes* No. 2434, 2435. The *Bundesakte für den deutschen Bund* stipulated in its Article 39: "Wenn das Bundesgebiet von einer auswärtigen Macht feindlich überfallen ist, tritt sofort der Stand des Krieges ein, und es muss in diesem Falle, was auch ferner von der Bundesversammlung beschlossen werden möge, ohne weiteren Verzug zu den erforderlichen Verteidigungsmassregeln geschritten werden." In Steinlein 1927 p. 67 n. 6. The Austro-German Treaty of 1879 considered by *attack* an hostile act which in fact qualified itself as war (feindliche Handlung die sich faktisch als Krieg qualifiziert). See the letter of William I to Bismarck, October 2, 1879, in *Grosse Politik* I, p. 111. Steinlein pp. 6/8: "Für den *casus foederis* im Verträge von 1879 verlangten die Parteien für den Angriff ein kriegsähnliches Verhalten, was auch schon durch die häufige Verwechslung des Wortes Angriff mit Krieg oder gar Angriffskrieg... in Erscheinung tritt." (p. 6). Cf. W. Hertz: *Das Problem des völkerrechtlichen Angriffs*. 1935 pp. 44 ff.; Pompe 1953 pp. 48/49.

¹¹⁶ *Recueil de Martens*, Tome X, pp. 10 ff.

Since the beginning of the 20th century, the term *act of war* had generally lost its authoritative and exclusive meaning. The only instance where it has been preserved is to be found in the province of the law of neutrality. As a rule, a neutral State is bound to exercise such control of the situation as it can and may not willingly permit infringements of its neutrality. Forcible measures taken to ensure the belligerents' respect of neutrality are *de lege* precluded from being acts of war in the classical sense.¹¹⁷ This is so even in the event that in repelling violations of neutral territory by force, it may occur that border incidents will be fought out on the territory of the belligerent which has committed the violation.¹¹⁸

Paragraph 2. The term "act of war" is given one more meaning in legal controversies on the legitimacy of armed reprisals.

I. *Evolution prior to the League of Nations.*

The elaboration of a distinction between war and military reprisals in the State practice after 1815 did not succeed in drawing a clear-cut

¹¹⁷ This principle has been laid down as a positive rule of war in Article 10 of Hague Convention V, which provides:

"Ne peut être considéré comme un acte hostile le fait, par une Puissance neutre, de repousser même par la force, les atteintes à sa neutralité." See A. de Bassompierre: *L'Article 10 de la cinquième Convention de la Haye*. RDILC 1923 pp. 2367; Castrén 1954 p. 442, with reference to Articles 5 and 10 of Hague Convention V and Articles 25 and 26 of Hague Convention XIII. See also Goodhart 1940 pp. 29/30 and below p. 208. In World War II, the British Government justified its conduct in the *Altmark case* on the ground that the voyage of the *Altmark* in Norwegian territorial waters constituted in that specific case an act of war on the part of Germany. See C.H.M. Waldock: *The release of the Altmark's Prisoners*. BYB 1947 pp. 216 ff. "The voyage of the *Altmark* through hundreds of miles of Norwegian territorial waters to escape capture by British warships went far beyond any legitimate interpretation of "mere passage", and in fact amounted to a use of neutral waters for warlike operations"; for the Norwegian standpoint, see *ibid.* p. 220.

M.O. Hudson: *The duration of war between the United States and Germany*. Harvard Law Review 1926 pp. 1020 ff. observed with regard to the declaration by Germany of unlimited submarine warfare on January 31, 1917, that it would be difficult to say that any 'act of war' had been committed by Germany against the United States prior to that date. "Nor did the communication of this intention constitute an act of war, although it led to a rupture of diplomatic relations on February 3, 1917". But the subsequent sinking of 7 American ships was represented on April 4, 1917, to the House of Representatives as "actually making war upon the peoples and the commerce of this country" (p. 1026). The Harvard Draft provided with regard to the obligation of neutral powers to observe impartiality that "a neutral state shall not be deemed to have violated Article 4 of this Convention by resorting to acts of reprisals or retaliation against a belligerent, because of illegal acts of the latter". AJIL 1939 p. 329.

¹¹⁸ Castrén 1954 p. 463. As to qualified neutrality, Guggenheim holds that it will be transformed into actual war if the neutral State proceeds to military acts outside of its territory. The acts committed under the Roosevelt declaration of September 11, 1941, constituted therefore acts of war. To the same effect, E. Borchard: *War, Neutrality and Non-Belligerency*. AJIL 1941 pp. 624/25; Wright 1942 pp. 8 ff. See Langer-Cleason: *The Undeclared War, 1940-1941*. 1953 pp. 435 ff.

borderline between these two legal institutions. In legal controversies upon the legitimacy of military reprisals and upon the chronological determination of when an armed reprisal evolves into a full-fledged war, the term *act of war* was increasingly used in a new sense which was very much like that of *casus belli*. This use was preferably made by the opponents of the distinction between war and military reprisal who thereby thought to be more persuasive. Act of war in this additional sense signified an act which did not bring out automatically a state of war, but which *per se* could be reasonably expected to give rise to a state of war if one of the parties to the dispute were willing to regard it in that light. It was in the logic of the doctrine which denied any difference between armed reprisal and war that any act of armed coercion must necessarily be an act of war, no matter whether it opened a full-fledged war or not.¹¹⁹ The predominant legal theory as well as State practice, although vigorously rejecting any such equation between armed reprisal and war,¹²⁰ nevertheless accepted the denomination of 'acts of war' for measures of coercion which did not create *ipso facto* a state of war. It is apparent, then, that while the employment of the term *act of war* in the new sense was logical for the opponents to the distinction between armed reprisal and war, it was contradictory in terms when used in State practice. A *locus classicus* of the latter event may be regarded in the statement of Earl Russel in 1864 with regard to the taking possession of the territory of a State which in that specific case had been styled "a material guarantee for the obtainment of certain international demands":

Such a practice is fatal to peace and destructive to the independence of States. It is destructive to peace because it is an act of war, and if resistance takes place, it is the beginning of war.¹²¹

Hence a distinction was necessarily to be drawn in legal theory between *acts of war* and *state of war* for the sake of compatibility with the predominant legal doctrine upon war. In speeches, in which the American President was defended in Congress in 1871 for directing the Navy to protect Santo Domingo during negotiations for its annexation, a distinction was drawn "between making war and merely committing acts of war in the sense of acts involving the employment of force".¹²²

No distinction, however, can be drawn between acts of war in this

¹¹⁹ In this sense, Funk-Brentano and Sorel offered already in 1887 the opinion: "Les représailles sont un acte de guerre isolé, mais elles sont un acte de guerre, elle ne rentrent pas dans le droit des gens en temps de paix et n'en résultent pas." *Précis du droit des gens*. 1887 p. 229; Fauchille 1926 Tome I, 3^e partie, p. 714.

¹²⁰ Earl Russel to Mr. Lettsom (Montevideo) on December 24, 1864: "...reprisals in the usual sense, and war, are not the same, the former affects the party only against whom the reprisals are made, the latter affects a third party, the neutral, also." *Fontes* No. 2375.

¹²¹ Instruction of Earl Russel to Lord Bloomfield (Vienna) and Sir Buchanan (Berlin) on January 18, 1864, *Fontes* No. 2438.

¹²² Moore, *Digest*, 1906, Vol. VII, pp. 166/67.

new, allegorical, sense, and armed reprisals. This is important for the determination in which of its two senses the term *act of war* has been employed in a specific case. Any such interpretation is to be derived from the context in which the term *act of war* is used. Hence when Great Britain, in 1862, told the Brazilian Government that

Reprisals are a well understood and acknowledged mode among nations of obtaining justice otherwise denied, and ... they do not constitute an act of war,¹²³

she obviously spoke of act of war in its original, i.e., technical, sense. This does not contradict the fact that reprisals which are not in the nature of armed coercion do not constitute an act of war. The borderline between armed reprisal and non-armed reprisal is not free from ambiguity in those cases where the question of armed reprisal or no armed reprisal depends upon the degree of coercion employed. The taking of property, private or State owned, if operated without considerable military assistance, was generally held to constitute a non-military reprisal and therefore exempt from being an act of war.¹²⁴ On the other hand, it is maintained that reprisals which consist in suspending all the particular stipulations concerning freedom of navigation and commerce which had been concluded with the peccant State "are *prima facie* acts of war".¹²⁵ It is presumably on the ground of this distinction that the British delegation to the Second Hague Peace Conference received the instruction that "anything which restrains acts of war is in itself a step towards the abolition of all war".¹²⁶

According to the distinction between *state of war* and *act of war*, it was said that the latter could not by itself initiate a war unless it was committed or reacted to with *animus belligerendi*. It follows that war appeared in the last resort as the result of the *animus belligerendi*, and not as the result of the act of war.¹²⁷

If there is no declaration, there can be no war, according to those who follow the Third Hague Convention. To those, an act of war could not possibly have the consequence of war, since there must be

¹²³ *Fontes* No. 2398. The declaration was made with regard to the seizure of Brazilian property by a British naval squadron. It was maintained that this measure remained within the bounds of a state of peace. Cf. also Mr. Christies (Rio de Janeiro) to Marquis Abrantes, 30.12.1862, *ibid.* No. 2373.

¹²⁴ Senor de las Carreras observed to Signor Barbolani (Montevideo) on January 11, 1865: "Reprisals and precautions for the safety of my fellow-citizens, 'says Councillor Saraiva', are not, as your Excellency is aware, acts of war." *Fontes* No. 2376. O. Hoiger: *La responsabilité des Etats*. 1930 p. 284.

¹²⁵ Hall-Higgins: *A Treatise on International Law*. 8th ed. 1924 p. 434.

¹²⁶ Fischer Williams: *Chapters on Current International Law*. 1929 pp. 188 ff.

¹²⁷ Wright AJIL 1932 p. 365 comments this legal fact as follows: "A victim of an act of war, if a recognized state, may always if it wishes, regard the act of instituting a state of war and if it does, a state of war exists. States victims of reprisals and intervention have usually been much weaker than the State employing such methods. Thus they have felt that the conversion of the situation, bad as it was, into a legal war, would be worse."

a declaration. To those who hold that war may exist without declaration, it would appear that an act of war does not automatically produce war, since there must be some evidence of intent to make war, or some objective determination.¹²⁸

The frequent use of the term *act of war* with this new connotation finally led to the general acceptance in international law that in no case could an act of military coercion alone ever produce war. Hence when the Russian fleet fired upon the British fishing vessels on the Dogger Bank in 1905, the incident remained, as neither national intended to set up a *casus belli*, within the state of peace, whatever may be the explanation of that extraordinary incident.¹²⁹

When the element of *animus belligerendi* was questioned in its sole competence to give an act of war the constitutive effect of a state of war, it was admitted that the resistance to an act of war would at least produce a war in the material sense. Anglo-Saxon legal thinking on war being long since in favour of the doctrine went so far as to regard any resort to armed force as being liable to constitute a state of war even if the intention of the challenge was expressly denied.¹³⁰ Anyhow, it became generally admitted as a rule that whether acts of war will lead to a state of war depends upon the position assumed not by the initiator of violence, but by the country attacked or invaded.

II. The connotation of "acts of war" under the Covenant.

Article 16 of the Covenant stipulated that

Should any Member of the League resort to war in disregard of its covenants under Articles 12, 13 or 15, it shall *ipso facto* be deemed to have committed an act of war against all other members of the League.

The framers of the Covenant, when they adopted Article 16 in its definite form, had understood the meaning of the term *act of war* in the sense of an act of military coercion in time of war.¹³¹ Their intention had been to bring into operation the purely objective doctrine of war, which was offered since the second part of the 19th century on the

¹²⁸ Eagleton AJIL 1941 p. 325.

¹²⁹ E.A. Jelf: *What is War? What is Aggressive War?* Grotius Transactions 1933 p. 105. Moore, *Digest*, 1906, VII, p. 153: "Force may be employed by one nation against another, as in the case of reprisals, and yet no state of war may arise. In such a case, there may be said to be an act of war, but no state of war."

¹³⁰ According to the Anglo-Saxon practice, it is held that if resistance against an act of war takes place, it is the beginning of war, no matter whether war is declared or not. Kappus 1936 p. 66; Eagleton AJIL 1941 p. 323. Such a beginning of war had generally retroactive effect to the first act of war "applying to all property detained and rendering it liable to be considered as the property of enemies taken in time of war. Sir W. Scott in *Robinson Reports*, V, p. 245.

¹³¹ D.H. Miller: *The Drafting of the Covenant*. 1928 vol. II p. 79.

ground that any military act of coercion brings about *ipso facto* a state of war and therefore constitutes an act of war.¹³² It follows that the meaning of *act of war* in this connection was very close to that in the original, i.e., technical sense. On the other hand, its determination was complicated by the fact that the Covenant implied a distinction between legitimate and illegitimate acts of war. Only the latter was envisaged in Article 16.

The great confusion with regard to the definition of *act of war* under the League, however, was due to the fact that the practice of the League obviously tended back to the subjective theory of war which had prevailed during the whole 19th century. As late as 1923, when the Committee of Jurists gave their advisory opinion, the element of *animus belligerendi* had been reintroduced as the decisive criterion for the existence of war.¹³³ As a consequence, reprisals in general could be again said to be a part of peace; they were not under all circumstances regarded as acts of war and if accompanied by force they might be so interpreted.¹³⁴ Since 1923, an act of war in the sense of the Covenant, if its determination was left to the Member-States, could be nothing less than an act of force, such as the seizure of territory, belligerent blockade or invasion of armed forces.

At no time had the text of the Covenant been modified so as to express itself without doubt in favour of either the objective or the subjective concept of war. While in practice the Members of the League were willing to recognize only the subjective concept of war, i.e., war in the formal sense, the Council of the League was in addition authorized to rely on the objective test, i.e., war in the material sense.¹³⁵ It follows that the phrase 'act of war' in our day has no distinctive technical significance in international law, but must be related to either formal war or material war. Act of war may have the paradoxical

¹³² The objective doctrine of war had its supporters during the whole existence of the League in the small States. From South America, P. Guani remarked that every measure of coercion of a military nature can be called an act of war. He argued that when a dispute arises, a State cannot be permitted to do justice for itself, under the Covenant. It is impossible, said M. Madelstam, to distinguish between reprisal and war. Eagleton 1933 p. 249.

¹³³ Hindmarsh 1933 p. 92; Kunz 1935 p. 5; Wehberg FW 1938 p. 144.

¹³⁴ Pompe 1953 p. 9 points out that "Italy occupied and kept Fiume, Poland in the same way obtained Wilna, the capital of Lithuania, while the latter in its turn took the East-Prussian Memel-territory. By the use of force, Poland managed to improve its position in Upper-Silesia, and the renewed occupation of the Austrian Burgenland by Hungary finally brought it the city of Oedenburg. All this happened at a time of peace." Reference is made to Gathorne-Hardy: *A short History of International Affairs, 1920-1939*. 4th ed., London, 1951, pp. 83-101.

¹³⁵ Specific mention is to be made of those treaty provisions which prevented the Council of the League from interpreting certain military reprisals as acts of war. See, for instance, the Hague Agreement of 1930, quoted in Schwarzenberger AJIL 1943 p. 477. The question whether the Ruhr occupation by France in 1923 was or was not prevented under the Versailles Treaty of being interpreted as an act of war, remained controversial. Kuei 1945 p. 29.

meaning of an act which would be an act of war, if the use of armed force is met with military resistance, it may designate an act of *animus belligerendi* or it may refer to the act of a belligerent called act of war, because it occurred under the legal status of war. According to the practice of the League, however, an illegitimate act of force in time of peace which was neither accompanied by an *animus belligerendi*, nor met with armed resistance, retained its legal character of an act of force short of war and was prevented from being qualified as an act of war.¹³⁶

Paragraph 3. Armed coercion under the Charter: Unilateral acts of force are not war in themselves.

The Charter of the United Nations no longer takes into consideration the concept of act of war in either of its senses. In that respect the term has been replaced by that of "threat or use of force". It follows, on the one hand, that under the particular international law of the Charter, the former distinction between acts of force being liable of constituting a *casus belli* and acts of force which are not, has been abrogated. Instead, it is left to the discretionary power of the Security Council to decide in each case before it, whether the said acts of force constitute a threat to or a breach of international peace. On the other hand, the Charter admits implicitly the principle that unilateral acts of force are not war in themselves, so long as they are not answered either by similar hostile acts of the other side or by enforcement measures of the United Nations.

This principle seems to be in contradiction to what the international Military Tribunal stated in the *German High Command Trial*, namely, that

The initiation of war or an invasion is a unilateral operation. When war is formally declared or the first shot is fired, the initiation of the war had ended and from then on, there is a waging of war between the two adversaries.¹³⁷

The practice of the courts of the International Military Tribunal, however, fails to be in harmony with this line, if the statement is regarded as a general commitment upon the material existence of war. While the

¹³⁶ The assertion that the term 'act of war' in war-preventing conventions refers to the concept of war in customary international law does not hold good for the League. It originally meant to express any illegitimate act of force in time of peace which could be legitimate only under the status of war. This meaning was, however, dropped forever during the early 1920's. Guggenheim Lehrbuch II p. 729 goes too far in generalizing that "jene an die mit der kriegerischen Handlung verbundene Störung des friedlichen Streitverfahrens für die Auslösung der Zwangsvollstreckung anknüpfenden Verträge haben unterlassen, die *Kriegshandlung* selbst zu definieren. Sie enthalten dafür einen Verweis auf den Kriegsbegriff des Völkergewohnheitsrechts." Cf. S. Séfériades: *La question des représailles armées en temps de paix*. RDILC 1936 p. 141.

For an opposite interpretation of 'act of war', Eagleton AJIL 1941 p. 325.

¹³⁷ A.D. 1948 case No. 119, p. 379.

same court 'constructed' the occupation of Denmark in 1940 as a war, it contradicted itself with regard to the invasions of German troops into Austria in 1938 and into Czechoslovakia in 1938 which it anxiously avoided calling either acts of war or war.¹³⁸ On the other hand, the court in the *Wilhelmstrasse Trial*, without taking the general line of the statement referred to, regarded the invasions into Austria and Czechoslovakia as acts of war which were said to be tantamount to a declaration of war.¹³⁹

All these pronouncements of the courts which are contradictory in appearance, must not be considered as authoritative statements upon the legal existence of war under general international law. It has been shown that it is in the logic of the *jus contra bellum* to admit the notion of 'aggressive war' in international penal law which is independent from the act of war as determined by the concept of war under general international law. Suffice it to repeat that the courts of the International Military Tribunal in Nuremberg and Tokio had to find upon the commitment of a criminal act called 'aggressive war', such as it was laid down in the international penal law *ad hoc* of the Charter of the I.M.T.¹⁴⁰ While the general international law admits only a causality between acts of aggression and war, the notion 'aggressive war' in international penal law of the Nuremberg Charter was constructed by the International Military Tribunal at Nuremberg and Tokio as establishing a relation of identity between acts of aggression and war of aggression. As a consequence, the terms 'acts of aggression' and 'aggressive war' marked only two aspects of the same crime according to whether the courts looked at its conspiracy charge or at its punishment.¹⁴¹

Though the terminology used in the Judgment lends here and there to uncertainty, the distinction between these aggressive acts, only mentioned as evidence to substantiate the conspiracy charge, and the aggressive wars, for which the responsible defendants were punished, was on the whole strictly maintained by the Tribunal.¹⁴²

¹³⁸ I.M.T. (Cmd. 6964) p. 125: "The occupation of Bohemia and Moravia must therefore be considered a military occupation covered by the rules of warfare. Although Czechoslovakia was not a party to the Hague Convention of 1907, the rules of land warfare expressed in this Convention are declaratory of existing international law and hence applicable."

¹³⁹ I.M.T. (Protocols) No. 806: "Eine Invasion dieser Art ist offensichtlich eine kriegerische Handlung; sie ist gleichdeutend mit einer Kriegserklärung, kann auch als solche betrachtet werden. Man kann vernünftiger Weise nicht annehmen, dass eine kriegerische Handlung wie eine Invasion, bei der die Eroberung und die Plünderung widerstandslos geduldet werden, in einem günstigeren Licht erscheinen soll als eine Invasion, welche auf irgend welchen militärischen Widerstand stösst." See also *ibid.* No. 807.

¹⁴⁰ Pompe 1953 pp. 188 ff.

¹⁴¹ We mark in the following the difference by the terms 'aggressive war' (international penal law) and 'war of aggression' (general international law) as has been specified above pp. 107, 115.

¹⁴² *Ibid.* p. 22.

As in ordinary criminal cases, so in the crime denominated aggressive war, the same elements must all be present to constitute criminality.

There first must be actual knowledge that an aggressive war is intended and that, if launched, it will be an aggressive war.¹⁴³

Instead of keeping strictly to these constitutive criteria of 'aggressive war' in international penal law, the courts at Nuremberg and Tokio thought it useful, for the sake of greater persuasion, to refer in certain cases also to the initiation of war, as it is conceived in general international law. The Nuremberg Judgement, for instance, which was based on "aggressive war against twelve nations"¹⁴⁴ thought it wise to specify the aggressions which Germany launched against Poland, Norway, the Netherlands, Belgium, Luxembourg, Greece, Yugoslavia, the U.S.S.R. and the U.S.A. (Germany declared war upon the U.S.A.) not only as 'aggressive wars' in the sense of international penal law, but also as 'wars of aggression' in the sense of general international law. As to the acts of aggression against Austria, Czechoslovakia and Denmark, the courts had no pains to submit them to the notion of 'aggressive war' in the sense of international penal law, but they exposed themselves to serious contradictions when they tried to strengthen their arguments by referring to the existence of war under general international law.¹⁴⁵ As to the legal impact of unilateral force in

¹⁴³ I.M.T. German High Command Trial, A.D. 1948 No. 119, p. 381.

¹⁴⁴ I.M.T. (blue series), vol. XXII p. 459; Heinze-Schilling 1952 p. 194 n. 64; Pompe 1953 p. 22 n. 2.

¹⁴⁵ Pompe 1953 p. 24. does not hit the problem when he offers the following opinion: "Denmark's occupation — a 'pacific occupation' according to classic international law — has been 'constructed' as an act of war by the Tribunal. On the one hand, there was Hacha's signature under the Treaty establishing the Czech protectorate, extracted, under the irresistible threat of an air-bombing of Prague, *before* the entrance of the German troops. On the other hand, there was King Christian's acceptance of the 'protection' *after* the entrance of German troops and some skirmishing. Between these two situations, the Nuremberg Tribunal drew the line within which it deemed the crime of aggressive war committed, even though there was no question of a legal state of war and not even of its usual material appearance."

It is significant that the International Military Tribunal termed the invasions of Germany into Czechoslovakia and Austria 'acts of aggression', but at no time the Tribunal went so far as to qualify them expressly as 'wars of aggression'. Judge L.W. Power did not fail in his dissenting opinion to make use of this fact. Heinze-Schilling 1952 No. 921.

As a matter of act, neither in the summer of 1938, nor in March 1939, was there any evidence which would justify the existence of either a material war or a formal war between Germany and Czechoslovakia. On March 15, 1939, the day German troops occupied Prague, no hostilities occurred between the German and the Czechoslovakian Armies:

"Les troupes allemandes doivent occuper Prague ce matin à 10 heures. Des bataillons de parachutistes tomberont auprès de la ville. Les troupes allemandes occuperont entièrement les deux provinces. Les troupes tchèques sont dès maintenant consignées dans leurs casernes. Si la moindre tentative de résistance se manifeste, a déclaré M. Goering, les forces aériennes du Reich, qui sont actuellement massées autour de la Tchécoslovaquie, procé-

general, suffice it to say that the identity of acts of force and *aggressive war* under international penal law (*de lata* or *de lege ferenda*) and the causality of acts of force and war under general international law are not mutually exclusive.¹⁴⁶

Far from abrogating the causality of acts of force and war in general international law, the International Military Tribunal in Tokio can even be said to have reaffirmed the principle that an act of force is not war in itself.¹⁴⁷

deront à une manifestation sur la ville de Prague afin de montrer aux Tchèques ce qu'il leur en coûterait s'ils résistaient à l'Allemagne" (French Yellow Book p. 72 No. 67). Nor had the Czechoslovakian Government of the time declared war upon Germany:

"Le Président de l'Etat tchèque, Dr. Hacha, et le Ministre des Affaires étrangères tchèques, Dr. Chvalkovsky, ont donné leur assentiment à toutes mesures nécessaires qui seront susceptibles d'empêcher une résistance de quelque nature qu'elle soit et à éviter toute effusion de sang. Les Services tchèques compétents militaires et civils ont reçu des instructions correspondantes. En conséquence, il y a lieu d'escompter que le processus de l'occupation et de la pacification des territoires dont il s'agit s'effectuera dans le calme et dans l'ordre complet." (French Yellow Book p. 74 No. 69).

It is only on December 16, 1941, that Dr. Benes, who in the meantime had again assumed the Presidency in exile, issued the following declaration of war:

"In accordance with Article 3, par. 1, of Section 64 of the Constitutional Charter, I hereby proclaim that the Czechoslovak Republic is in a state of war with all countries which are in a state of war with Great Britain and the United States of America and that the state of war between the Czechoslovak Republic on one side and Germany and Hungary on the other side, has been in existence since the moment when the Governments of these countries committed acts of violence against the security, independence and territorial integrity of the Republic." Quoted from K. Marek: *Identity and Continuity of States in Public International Law*, 1954 p. 308. This author rightly asks the question: "Which were the actual 'acts of violence' from which Dr. Benes dated the existence of a state of war between Germany, and Hungary, and Czechoslovakia?" He thinks that the answer to this question is to be found in a much earlier statement by Dr. Benes, of February 1, 1940, i.e., before his assumption of the Presidency in exile: "Czechoslovakia has been at war with Germany since the summer of 1938. Since March 1939, the Czechoslovak lands are a military occupied territory." Marek, while questioning the retroactive effect of Dr. Benes' declaration of war, is willing to admit "that a state of war has indeed come to prevail between Germany and Czechoslovakia. It could be dated either from that declaration or from the moment the first Czechoslovak units went into action against the German" (p. 309).

¹⁴⁶ To an opposite effect, Pompe 1953 pp. 33 ff. who speaks of a "disappearance of the concept of war".

¹⁴⁷ To the same effect Oppenheim-Lauterpacht IntL. II pp. 202/3. To an opposite effect, Guggenheim Traité II p. 594 who quotes from history as acts of force being war in themselves: (1) the invasion of the Rumanian Army into Bulgaria in 1913 (see above, p. 59, n.65); (2) the invasion of the USSR into Poland in 1939; (3) the invasion of Germany into Denmark in 1940 (see below p. 211); (4) the war of the Turkey against Germany. The latter had been declared upon Germany on February 23, 1945. *Revue de Droit international, de Sciences diplomatiques, politiques et sociales* (Sottille), 1945, p. 53.

The only conclusion that can be drawn from the Tokyo Judgment is that in case of a mere threat of force or in the absence of all signs of resistance or disapproval on the part of the government in whose territory the troops have entered, there can be no question of war.¹⁴⁸

SECTION 4. CONCLUSION.

The recognition of material war in international law besides the concept of formal war has been most widely urged on behalf of the prevention of *de facto* war. This apparently paradoxical statement derives its logic from the fact that in law a subject-matter cannot be handled without being previously defined by the law itself. As a consequence, the legal practice with regard to the abolition of armed contests, such as reprisals and interventions, constitutes one of the sources for the elaboration of the concept of material war. At the same time, this concept has become expressive of the fact that international law being still a primitive legal order, the outlawry of war must be sanctioned in the last resort by material war. It is in this concern that the application of the laws of neutrality has become selective, i.e., that it is not applicable to its full extent in any such material war.

The coexistence of material war and formal war does not, however, make any act of force an 'act of war'. To this extent the orthodox dichotomy of war and measures short of war (*Gewaltanwendung ausserhalb des Krieges*) have not been abrogated. What has changed is that the scope of measures short of war has been considerably diminished. In general international law, the concept of war, no matter whether formal or material, has retained its bilateral character, which in a formal war may be fictional. As a consequence, unilateral acts of force which are committed without *animus belligerendi* and which are offered no resistance, do not in themselves constitute 'war'.

So far, only the working principles have been analysed which led up to a trichotomy of formal war, material war and acts of force short of war. It has to be checked against State practice, since the League of Nations. It then remains to evidence the other *raison d'être* of the concept of war in the formal and material senses which is to provide for a guidance directive towards the selective application of the laws of war.

¹⁴⁸ Pompe 1953 p. 34.

PART 2

THE INSTITUTIONALIZATION OF WAR IN CONTEMPORARY INTERNATIONAL RELATIONS.

CHAPTER VI

STATE AND COURT PRACTICE WITH REGARD TO WAR SINCE THE LEAGUE OF NATIONS

SECTION 1. THE PRACTICE OF THE LEAGUE OF NATIONS WITH REGARD TO WAR.

The Covenant of the League of Nations was expected to establish a system of collective security. The history of the drafting of the Covenant gives clear evidence that no precise meaning of the term 'war' was intended to be attached to it in establishing rules appropriate to the realization of that collective security. Terms such as 'war' and 'use of force' were bandied about by the framers of the League so casually that it is difficult to believe that they were aware of the significant difference in their meanings.¹ It was thought possible to leave it open

¹ Cf. Hindmarsh 1933 pp. 132 ff. Hindmarsh gives the following significant details of the drafting of the Covenant with regard to war:

"In the Preamble of the Covenant the phrase 'use of force' was first inserted at Mr. Miller's suggestion because Colonel House always wanted some words against war in the Preamble of the Covenant. The drafting Committee later substituted the word 'war' and the change was agreed to by Mr. Miller in a telephone conversation with Lord Eustan Percy. In Wilson's first draft of the text of the Covenant sanctions were to become operative if any Power shall declare war, begin hostilities or take any hostile step short of war. In his second draft Wilson uses the terms 'resort to armed force' and 'hostile action short of war'. The British drafts (Phillimore, Cecil and Smuts) had consistently used the term 'war' only, making no attempt to include limitation of resort to force short of war. In the amalgamation of the British and American drafts the American phraseology was retained. The Hurst Miller draft of February 4, 1919, contained the clause "They (signatories) will in no case resort to armed force". The Commission of the League left the terms substantially as they were. The clause was changed by the Drafting Committee to: "They will in no case resort to any act of war" and finally in the printed version it included simply 'resort to war'. There is no evidence of the reason for the last change, although it was fundamental. Nor is there any evidence to show that the significance of the change from 'armed force' to 'war' was recognized as striking at the practical basis of the Covenant."

to the League to establish for itself an adequate definition of *war* and *resort to war* for the purpose of an effective collective security.²

Paragraph 1. The military incursion of Yugoslavia into Albania in 1921.

The conflict had its origin in the Yugoslavian-Albanian dispute on the demarcation of their common frontier.

In the early days of July 1921 Yugoslavian troops occupied the district of Gashi and Krasinki in the mountains of Jakova, to the east of Scutari.³ According to the statements of the Yugoslavian representative to the Council of the League these districts had already been occupied by Yugoslavian troops at the invitation of their inhabitants. There occurred further raids of the *comitadjis* into Albania in the course of the same month, and on July 30, Halid Liechi and Taf Raziu were invaded by about 11,200 *comitadjis*.

On September 17, Serbian regular troops advanced upon Arras in Albania. This was followed on October 11 by a Serbian ultimatum to the Albanians and by a forward movement which by October 20 had spread as far as Oroshi and Lurya.⁴ On November 5, there appeared a statement in *Pravda* to the effect that the first Albanian prisoners had arrived and that the operation begun by the Serbian troops had completely taken the Albanian forces by surprise. On November 6, the *Sloviniski Narod* stated: "We are in a state of war with Albania. Our General Smiljanich has taken positions which we must hold."⁵

Upon these facts the British Government reacted by submitting to the attention of the Council of the League the following communication: "Continued advance of Serb-Croat-Slovene forces into Albania being of nature to disturb international peace, His Majesty's Government desire to call the attention of the Council thereto and request that you will take immediate steps to summon a meeting of the Council to consider the situation and to agree upon measures to be taken under Article 16 in the event of the Serb-Croat-Slovene Government refusing or delaying to execute their obligations under the Covenant." There is little doubt that the British diplomacy considered the above mentioned facts as a possible resort to war in disregard of the Covenant. When the Council met a few days later to examine the British request, the Yugoslavian troops had been withdrawn in the meantime.

The case is of particular interest inasmuch as it is the only instance in the history of the League where resort to armed force in itself was regarded to make a case for the application of Article 16 of the Covenant.⁶

² The meaning of the term 'war' for the purposes of the Covenant had to be worked out in the first place with regard to Article 16.

³ LoN O.J. 1921 p. 483.

⁴ *Ibid.* p. 1184.

⁵ *Ibid.* pp. 1191/92.

⁶ Cf. Hindmarsh 1933 p. 130.

Paragraph 2. The Greco-Italian conflict in 1923.

On August 27, 1923, the Italian delegation on the Commission set up by the Conference of Ambassadors for the delimitation of the southern frontier of Albania was assassinated on Greek soil by unknown persons on the road between Jannina and Santi Quaranta, a few kilometers from the Greco-Albanian frontier. General Tellini, chief of the Italian delegation, belonged to the victims of this crime.⁷

Before any kind of proof was forthcoming as to the nationality of the aggressors and the motives and circumstances of the crime, the Italian Government threw the moral responsibility for the crime upon the Greek Government and demanded certain measures of satisfaction and reparation. A great deal of these demands were in fact incompatible with the sovereignty of Greece, as, for instance, the request of "honours to be paid to the Italian flag, by the Greek Fleet in the port of the Piraeus represented by a naval squadron which will visit the Piraeus for this special purpose, these honours to consist of a salute of 21 guns fired by the Greek warships, which will hoist the Italian flag while firing the salutes". Moreover, an indemnity of 50 million Italian lire was required, which was to be paid within five days after the presentation of that note.⁸ The Greek Government rejected several points of this demand, insofar as it constituted an infringement of the sovereignty and an injury to the honour of Greece. Instead, she proposed to lay the dispute before the League of Nations.

Thereupon Italy responded on August 31 by bombarding Corfu. The action turned out as being directed against barracks "containing Greek and Armenian refugee women and children, many of whom were wounded and about 15 killed".⁹ A portion of the territory of Greece was occupied by Italian detachments and a cruiser entered the territorial waters of Corfu and proceeded immediately to a disembarkation of troops.

The Greek Government did not fail to bring its dispute with Italy immediately before the Council. She pinpointed the problem quite bluntly in asking the League "whether this was not the case contemplated by Article 16 of the Covenant". Under this Article it was agreed that "should any Member of the League resort to war in disregard of this covenants under Articles 12, 13 or 15, it shall ipso facto be deemed to have committed an act of war against all other Members of the League".

The Greek representative justified his point in saying "that acts must be judged objectively and it is for the Council to judge the acts regarding which Greece has the right to complain".¹⁰ This standpoint was met by Italy with a categorical refusal. It emphasized that "Article 16 cannot be applied to Italy. As appears from the official declaration of the Italian Government, Italy did not intend to commit an act of war.

⁷ LoN O.J. 1923 p. 1412.

⁸ *Ibid.* p. 1413.

⁹ *Ibid.* p. 1277.

¹⁰ *Ibid.*

No Power under these circumstances would tolerate the application of Article 16".¹¹

M. Salandra, the Italian representative, pleaded his case in saying that the bombardment and occupation of Corfu was a way of peaceful reprisal which he deemed in accordance with international law: "Such measures have usually constituted a reply to acts of violence of much less gravity from the point of view of international law, than that which was the original cause of the occupations of Corfu."

Lord Robert Cecil, the British representative, protested that such an act of armed coercion could hardly be called a pacific measure. He declared himself unable to understand how it differed from an act of war, the representative of Sweden concurring. Thanks to the activity of the Conference of Ambassadors the conflict was in a short time settled by diplomatic channels without any pronouncement on the very question at issue, i.e., "how the occupation of a portion of the territory of another State by armed forces, accompanied by a bombardment which killed fifteen individuals and wounded others, can be regarded as a pacific measure under the League and by which characteristics it differentiated from an act of war?"¹²

Accordingly, some Members of the Council, above all the representatives of Great Britain and Sweden, remained very much worried that the occupation of Corfu, in clear contravention of the principles laid down in the Covenant, might set up a dangerous precedent.¹³ Therefore the Council of the League appointed a Committee of Jurists which was directed to give an advisory opinion to the following question: "Are measures of coercion, which are not meant to constitute acts of war consistent with the terms of Articles 12 to 15 of the Covenant?"¹⁴

Paragraph 3. The Polish-Lithuanian state of war from 1920-1927.

During their victorious advance on July 12, 1920, the Bolsheviks had made a peace promise to hand over Vilna and its district to Lithuania. During the retreat of the Bolsheviks Lithuania effected a side attack on the Polish army. On October 9, 1920, General Zeligowski, who commanded the 1st White Russian Division, defeated the Lithuanian forces at Jaszuny and thereupon occupied the city and territory of Vilna on behalf of Poland.¹⁵

Since the battle of Jaszuny and the occupation of Vilna which followed it, Lithuania kept maintaining that it was in a state of war with Poland. Overtures which had been made since 1920 by Poland for reconciliation between the two countries were rejected by Lithuania who did not cease reinvoking the existence of a state of war between the two countries. This standpoint was upheld in spite of Lithuania's

¹¹ *Ibid.* p. 1278.

¹² *Ibid.* p. 1279.

¹³ *Ibid.* p. 1306.

¹⁴ See above p. 159.

¹⁵ W.F. Reddaway: *The Cambridge History of Poland 1697-1935*. 1941 pp. 530 ff. Cf. Wehberg RdC 1934/II pp. 100/01.

publicly acknowledging that military operations for the purpose of recapturing Vilna were out of question.¹⁶ As a consequence, the Lithuanian Government held itself entitled to make use of the war clause in the Barcelona Conventions of 1921. In a memorandum annexed to the note of October 18, 1923 to the Conference of Ambassadors, Lithuania expressly maintained, that in view of the state of war existing between Poland and Lithuania, it had been unable to admit of the application of the Barcelona Conventions in its relations with Poland. The relevancy of this argument was taken into account by the Conference of Ambassadors.¹⁷

Accordingly, Poland reasonably declared that it is "a grave and serious mistake if it would be said that this is a fictitious war and, in a sense theoretical war and that so long as the guns are silent there is no need for alarm or intervention".¹⁸ Lithuania, in default of any interference of the League of Nations, remained indeed unhampered in her giving effect to the proclaimed state of war with Poland. Therefore Poland, in a note of May 14, 1927, "appealing to the duties incumbent on Lithuania as a Member of the League of Nations and to the general interest of peace urgently insists on the evident necessity of obtaining from the Lithuanian Government ... a formal declaration proclaiming as non-existent the so called state of war between the two countries". As, in reply to that note, the Lithuanian Government restated to the Allied Powers that the state of war between Lithuania and Poland continued to exist, the conflict was finally drawn to the attention of the League of Nations' Council.¹⁹

In the meeting of the Council of December 7, 1928, the Polish representative pointed out that "there is a contradiction between the existence of a state of war such as has been invented by Lithuania and the situation created by the Covenant as between Members of the League of Nations. If the state of war exists, Lithuania obviously cannot appeal, as she has just done, to Article 11 of the Covenant. How can she claim that steps should be taken for the maintenance of peace between two States which are already, if one of them is to be believed, in a state of war?"²⁰

¹⁶ By this coup, Zeligowski broke the agreement which the League of Nations, not without difficulty, had brought about two days earlier at Suwalki. Under the terms of this military agreement, military operations between Poland and Lithuania had to be ceased and a temporary line of demarcation was drawn leaving Vilna on the Lithuanian side. On March 15, 1923, the Conference of Ambassadors assigned both the city and territory of Vilna definitely to Poland. Lithuania, however, refused to recognize the decision and, as it had done since 1920, continued to protest against the Polish occupation. It refused to establish diplomatic relations with its neighbour or to allow any traffic between Lithuania and Poland. Cf. Reddaway 1941 p. 530; Grob 1949 p. 96.

¹⁷ See the note dated June 2, 1924 of the Conference of Ambassadors, drafted at the occasion of the signature of the Memel Convention, in LoN O.J. 1928 p. 150.

¹⁸ LoN O.J. 1928 p. 151.

¹⁹ LoN O.J. 1928 pp. 144 ff.

²⁰ *Ibid.* p. 150.

Lithuania, however, retorted that the state of war at issue had equally found its relevance in Poland. She drew attention to the fact that according to the judgements delivered by Polish tribunals against Lithuanian nationals the claims of the latter had been rejected by reason of a state of war between the two countries.

The conflict was settled by the Resolution of December 10, 1927, in which the Council of the League of Nations, after an examination of the facts, declared that "a state of war between two Members of the League is incompatible with the spirit and the letter of the Covenant by which Lithuania and Poland are bound". Express notice, however, was taken of the "solemn declaration made by the Lithuanian representative that Lithuania does not consider herself in a state of war with Poland and that in consequence peace exists between their respective countries".²¹

In the case *In re Zabita*²² the Lithuanian Supreme Court considered that resolution as the termination of the state of war between Poland and Lithuania. It stated that prior to that date "although no acts of war had been committed between Lithuania and Poland for some time, there was, juridically, a state of war between the two countries. Since the Resolution of December 10, 1927, the state of war was terminated. It did not matter that there were no diplomatic relations between Poland and Lithuania".

Paragraph 4. The Greco-Bulgarian incident in 1925.

On October 23, 1925, the League was informed by the Bulgarian Government that as a result of a frontier affray three days before, numerous Greek forces had entered Bulgarian territory, supported by artillery and by air bombing. The Bulgarian Government ordered Bulgarian frontier posts not to resist this invasion by force. As a consequence, Greek military force had been able to occupy several Bulgarian posts in the Strumna Valley. Up to October 26, the Bulgarian losses were 48 killed and wounded, including 26 soldiers, 22 civilians, men, women, children. In its dispatch of October 22, the Bulgarian Government by virtue of Articles 10 and 11 of the Covenant requested the Council to take the necessary steps without delay.²³

Under the firm leadership of Briand, the Council entered the affair

²¹ *Ibid.*

²² A.D. 1929/30 case No. 288: The accused, a member of the Lithuanian Army, was granted leave until August 15, 1928. He did not return to his contingent on the expiry of his leave and was reported to have gone to Poland. On August 19, he was stopped at the frontier and brought back to his contingent. The Military Tribunal, basing itself on Article 136 of the Military Code relating to desertion to the enemy, sentenced Zabita to 15 years imprisonment. The accused submitted that since the Resolution of the Council of the League of December 10, 1927, there was no state of war between Lithuania and Poland, and Poland could therefore not be regarded as an enemy being at war with Lithuania.

²³ LoN O.J. 1925 pp. 1696 ff.; O.J. 1926 pp. 196 ff.; Cf. Wehberg 1931 pp. 46 ff.; Walters: *A History of the League of Nations*. 1952 vol. II pp. 311 ff.

with zest and authority and convoked an extraordinary session to commence at Paris on October 26th. The contending parties were exhorted "to give immediately instructions that, pending consideration dispute by Council, not only no further military movements shall be undertaken but that troops shall at once retire behind their respective frontiers".²⁴ The Greek Government, in complying with this request, pointed out "that all the measures which the military command has been compelled to take are nothing but measures of legitimate defence and could not be considered as acts likely to lead to a rupture in accordance with the terms of Article 12 of the Covenant".

Once any further danger of a renewal of hostilities has been banned, the Council was ready to listen to the arguments and complaints of the parties. A Commission of inquiry was sent to the spot which decided that an indemnity of £ 45,000 should be paid for the moral and material losses inflicted on Bulgaria.

It may be questioned whether the Greco-Bulgarian incident had led up to *de facto* war since on the one hand Bulgaria had given orders not to repel the intruder by force, and on the other hand Greece had declared "that the energetic attitude of the Greek Government excludes any idea of warlike intentions on the part of our country".²⁵ Yet the Council, in hinting at a possible resort to war under Article 16, certainly had in mind the armed hostilities which had actually taken place.²⁶ Owing to the fact that the latter had been stopped before the meeting of the Council no inquiry was necessary into the legal nature of the armed hostilities.

*Paragraph 5. The Chinese Eastern Railway conflict in 1929.*²⁷

On August 16, 1929, Soviet military troops started penetrating to Jali Nor — a coal field on the Chinese Eastern Railway, about eighteen miles south-east of the north-western frontier stations of Manchouli.²⁸ Coordinated military operation of the Soviet troops, however, were not started before November 17, 1929, when the Soviet forces launched a vigorous attack against Machouli and Jalei Nor. Both places were captured with their Chinese garrisons. The Soviet forces engaged in this campaign were estimated at some 3,000 combatants, who were well-equipped, efficient and under strict discipline. By this military coercion the USSR admittedly intended to bring the Chinese government to terms

²⁴ O.J. 1925 p. 1697. In its public meeting on October 26, the Council requested that within 24 hours "the Bulgarian and Greek Governments have given unconditional orders to their troops to withdraw behind their respective national frontiers, and within 60 hours that all troops have been withdrawn within the national frontiers, that all hostilities have ceased."

²⁵ *Ibid.* p. 1708.

²⁶ See also LoN O.J. 1925 p. 1709.

²⁷ Cf. A. Toynbee: *Survey of International Affairs*. 1929 pp. 359 ff., P. Clyde: *A History of the Far East*. Pp. 556/57; Gottschalk ZfV 1933 pp. 201/02; Hill AJIL 1948 pp. 355.

²⁸ Diplomatic relations had been broken off by Russia on July 18, and by China two days later.

in accordance with a note the Soviet Government had drafted on July 13, 1929. She appears to have made up her mind to obtain a settlement on these terms by negotiations with the Chinese *à deux* without any intervention of third Parties.

Both powers, however, had recently signed the Briand Kellogg Pact. An appeal of Stimson, the American Secretary of State, which reminded both Russia and China of their obligations to use pacific means, was formally approved by all the major powers signatory to the Pact and also by China and Russia, who gave assurance that they would not resort to force — save in self-defence.²⁹ All offers which were made by third States for mediation through diplomatic channels were firmly refused by Soviet Russia.³⁰

Neither the USSR nor China expressed the intention to wage war. Russia remained eager not to exert more than the minimum pressure necessary to achieve their diplomatic aim. This restriction of the use of military force within the narrowest possible limits, which can be considered as the essence of the Russian policy in this case, can by no means alter the fact that the two countries were engaged in a material war. This was finally admitted by the belligerent powers themselves. In Article 9 of the Chabarovsk Protocol of December 22, 1929, China and Russia agreed to "reestablish immediately the state of peace at the Sino-Russian frontiers".

Paragraph 6. The Leticia Dispute between Colombia and Peru 1932-1935.

The bone of contention in this military conflict was the boundary treaty of March 24, 1922, which transferred to Colombia the Leticia district, inhabited mostly by Peruvians and which gave Colombia access to the Amazon River. Pushed by the aspirations of the Peruvian population, Peru desired to obtain a modification of the treaty. On September 1, 1932, a party of men, including a second in command Lieutenant La Rosa, Chief of the Peruvian garrison at Chunbote, and some Peruvian soldiers from this garrison and also from the garrison at Ramon Castilla, crossed the Amazon River and attacked and took the town of Leticia in Colombian territory, imprisoned the Colombian authorities and police officers, took over the government property and funds and undertook the administration of the town and district.³¹

²⁹ U.S. Foreign Relations 1929 II pp. 186 ff. China, in drawing the attention of the signatory powers of the Briand Kellogg Pact to the Russian acts of aggression, declared that "there was no formal declaration of war and the aggressions were perpetrated while responsible spokesman on both sides were consulting a third party and striving to reach an agreement". Quoted from Gottschalk ZfV 1933 pp. 201/02.

³⁰ The Moscow Government asserted "that the measures taken by the Red Army had been taken entirely in self-defence and were in no way a breach of the Pact of Paris.

³¹ Cf. AJIL 1933 p. 317. In the early exchanges during the first part of September 1932 the Government of Peru officially disavowed the act, denied any connection with the expedition and expressed a desire to assist

In January 1933 Colombia proceeded to exercise her sovereign rights in Leticia by sending a flotilla, consisting of seven or more vessels with one to two thousand troops, up the Amazon to subdue Leticia.³² The first conflict occurred on February 14, when Peruvian planes attempted to bombard the Colombian flotilla on the Putumayo and were fought off by Colombian planes. On the next day a Colombian landing force captured the town of Tarapaca in Colombian territory after bombardment by the gunboats and planes. Meanwhile the Colombian government, after having consented in submitting the case to a Conciliation Committee and later on to the mediation of the United States, had appealed by a resort on January 25, to the Council of the League of Nations.³³ She nevertheless continued her military efforts to retake possession of Leticia.³⁴

On March 18, 1933, a draft report was presented to the Council for observation by members as well as by the representatives of Colombia and Peru. The Council declared in that report, which was formally

in restoring normal conditions. In a note of September 30, she stated however, that the uprising revealed a situation growing out of the treaty of 1922 by which the boundaries between Colombia and Peru had been fixed and whereby Colombia acquired the Leticia district and obtained access to the Amazon River. Moreover she declared that the bonds of geography, commercial interest, nationality and blood which exist in that district, would produce conflicts in the future.

³² On January 6, the commanding general in eastern Peru notified the commander of the Colombian flotilla that he would take military measures to prevent Colombian forces from entering Leticia. A note of January 11, in which Colombia requested Peru to withdraw her forces from Colombian territory, was met with a refusal. As a result hostilities between the opposed forces could no longer be prevented.

³³ In a letter dated March 2, 1933, from the President of the Committee of the Council to the Peruvian Representative, the Committee recalled the following facts: The Colombian delegate has given assurance that the Colombian troops in far distant posts have received instructions to take no action which can be considered as an act of provocation or hostility towards the Peruvian Government, on the other hand, has undertaken to cease hostilities pending the present negotiations. The Committee understands, that Peru binds herself to take no act of hostility or provocation against the forces of Colombia in Colombian territory and the Colombia binds herself to take no act of hostility or provocation against the forces of Peru in Peruvian territory. See LoN O.J. 1933 p. 583.

³⁴ On March 17, a military engagement between the two powers took place near Buenos Aires on the river Cotuhé. The Peruvian forces after offering resistance to the Colombian forces, fled into the forest in the direction of Leticia, leaving in the possession of the Colombian groups machine guns and ammunition. 5 Colombian soldiers were wounded and one was killed by the fire of the Peruvian troops. The Peruvian casualties were not known. At 5 o'clock on the afternoon of the same day, six modern Peruvian army aeroplanes attacked the Colombian gunboat Cordoba and the garrison which had established itself in the place abandoned by the Peruvians, dropping a large number of bombs which did not cause any damage. In defence, the gunboat made use of its anti-aircraft artillery and one Peruvian aeroplane appears to have been brought down. For further particulars of the hostilities see LoN O.J. 1933 p. 577; AJIL 1933 pp. 319 ff.

adopted on the same day, that the presence of Peruvian forces in Colombian territory is incompatible with the principles of international law, with those of the Covenant of the League of Nations and the Pact of Paris.³⁵ As a consequence the representatives of Colombia and Peru signed at Rio de Janeiro a Protocol of Peace, Friendship and Cooperation dated May 24, 1934, which, together with an Additional Act, brought about a settlement of the dispute over the so-called 'Leticia trapezium'.³⁶ By Article 7 of the Protocol the two countries obligated themselves "not to make war nor directly nor indirectly to employ force as a method for the settlement of their present problems or of any others which may arise in the future".³⁷

During the whole conflict both the contending parties and the League anxiously avoided the term 'war', in order to keep off any consideration of Article 16 of the Covenant. The terminology used for the denomination of the clash of arms which had occurred was held in words like 'hostilities', 'acts of aggression', 'acts of hostilities', or violation of 'the principle of the Pact of Paris'. The frequent use of the latter term obviously corroborates the legal fact that the League was dealing with a case of 'resort to war as an instrument of national policy'.³⁸ The way of the League's proceeding in the Leticia conflict set an example of how to handle a *de facto* war without applying Article 16 of the Covenant. From the legal viewpoint the instance became a persuasive precedent against early suggestions, according to which the use of any armed force ought to provoke automatically the application of Article 16. In future, *de facto* war between League members, if neither declared by one of the contending parties nor qualified as such by the Council, was not war for the purposes of the Covenant.

Paragraph 7. The Chaco War 1932-1935.

The war was fought for the possession of the vast area known as the Chaco which separated the acknowledged territories of Bolivia and Paraguay. Each claimed the whole area and each was in effective control of a small sector nearest to its own territory. Although Bolivia and Paraguay could have no prospect for centuries to come for making practical use of the Chaco, each maintained a considerable number of small forts in its central areas and expended great effort in advancing its own outposts and trying to obstruct any similar advance from the other side.³⁹

³⁵ The Council recognized in substance, that the treaty of 1922 was in force, that the Leticia Trapezium was a part of the Republic of Colombia, that this district had been invaded by Peruvians who still held the district and who had been supported by the military of Loreto. Cf. AJIL 1933 p. 525.

³⁶ Cf. AJIL 1935 p. 95.

³⁷ *Ibid.*

³⁸ Cf. O.J. 1933 pp. 498, 524, 526, 532, 536. See Walters 1952 p. 536.

³⁹ Walters 1952 p. 526; cf. AJIL 1929 p. 110; AJIL 1930 pp. 122, 573; AJIL 1934 pp. 534, 724.

On December 5, 1928, Paraguayan troops attacked the Vanguardia fort by surprise, set fire to it, killed the majority of its occupants and took survivors prisoners. A few days later fresh engagements took place between Paraguayan and Bolivian troops, in the course of which the Paraguayans were repulsed and the Boqueron fort occupied.⁴⁰

The League responded to these events and was ready, if need be, to brand them as war.⁴¹ It was pointed out in the *aide mémoire* of the acting President of the Council to the Chargés d’Affaires of the Argentine and the United States of America that if the two disputing governments did not accept such mediations as will afford the likelihood of the settling by pacific methods, the Council would have to consider “what measures should be taken either because war has broken out — or because it is on the point of breaking out” Eventually a body, known as the Neutral Commission, which consisted of the representatives in Washington of Colombia, Cuba, Mexico and Paraguay, succeeded in liquidating the above mentioned incident. A truce was signed on January 3, 1929, followed by efforts of conciliation. On June 15, 1932, however, fresh military engagements occurred between the two countries, which brought them eventually to a state of war.

By the end of April it became clear that neither the Neutral Commission nor the combined efforts of Argentina, Chile, Brazil and Peru would ever be capable to ensure the cessation of the hostilities. At this point, Paraguay, alarmed by the growing strength of the Bolivian forces and aware that munitions were reaching that country in large quantities, decided by a vote of Congress on May 10, 1933 to declare war. The declaration, issued in conformity with Hague Convention III, stated that it was made “in order that other States, and especially the neighboring nations, may be able to regulate their relations with the belligerents”. When Paraguay declared war she believed that this would prevent the transit of war material through the Pacific ports of Chile and Peru. Her announcement was indeed followed by declarations of

⁴⁰ Thereupon the Paraguayan government complained in a letter to the acting President of the Council “that it was Bolivian troops who, taking us by surprise and without declaration of war, thus acting contrary to the practice in use between civilised nations invaded our territory, attacked our military outposts and bombarded our positions from the air”.

⁴¹ On December 15, 1928, the Council sent Bolivia and Paraguay a telegram which contained the following declaration: “The Council wishes to emphasize the fact that in its experience it is most important to confine all military measures of a defensive character to those which cannot be regarded as aggressive against the other country and which cannot involve the danger of the armed forces coming into contact, as this would lead to an aggravation of the situation, rendering more difficult the efforts at present being made for the maintenance of peace.” LoN O.J. 1929 pp. 72/3.

⁴² Bolivia accused Paraguay of having launched on this day a surprise attack with 500 soldiers against the Santa Cruz outpost which had cost her 7 dead and 2 missing. Paraguay, in her turn, contended that on the same day her Lopez outpost had been taken by Bolivian troops. Since that day fighting went on and degenerated into large-scale military operations. Cf. O.J. 1932 p. 1574.

neutrality by all the neighbouring States.⁴³ Yet neither Chile nor Peru considered that they were obliged to prevent the transit of munitions. Argentina did, however, put a stop to the export not only of war material but also of foodstuffs on which the southern wing of the Bolivian army had come to depend.⁴⁴

On May 10, the Bolivian Minister for Foreign Affairs addressed the following telegram to the President of the Council of the League of Nations: "In declaring war on Bolivia... Paraguay has placed herself outside the Covenant and has incurred the sanctions provided for in Article 16. Bolivia denounces Paraguay as having been the first to provoke the conflict and of now obstructing the efforts with a view to its pacific settlement."⁴⁵

Paraguay reacted in stating that "Paraguay has not declared war on Bolivia as the latter gives it to be understood. She has done nothing more than denounce a state of war with Bolivia which has been existing since June 15, 1932... The provisions of Article 16 of the Covenant are only applicable against the aggressor, that is to say against the party which refuses an armistice and arbitration. This is not the case as regards Paraguay".⁴⁶

The Council, in its 72nd extraordinary session, discussed the invoked application of Article 16 in full.⁴⁷ On the whole, it took the point that "if in peacetime a country's territory is invaded it can invoke Article 16 and the Council's duty is to apply it without initiating any previous procedure. But, in this particular case the situation is not the same. A state of hostilities has been in existence for nearly one year and further, the Council has never been placed in a position to apply Articles 12, 13, and 15."⁴⁸

Once the Council had received authorization to take charge of the Chaco war for its settlement, it insisted in its meeting on May 20 on dispatching a League Commission to the spot in order to prepare an effective armistice. The report of this Chaco Commission, which was eventually submitted to the Council in February 1934 prophesied accurately the development of this war. The Commission reached the conclusion that the war was supposed to go on, and when both parties

⁴³ Declarations of neutrality in conformity with Hague Convention III were made by Chile, Argentina, Brazil, Peru, Uruguay and also by Germany. The United States, which did not declare herself neutral, continued to call the hostilities 'an armed conflict', instituted an embargo upon the two belligerent countries but did not apply her municipal laws upon neutrality. Cf. Toynbee: *Survey of International Affairs*. 1933 pp. 393, 404; Grewe ZADR 1940 p. 356; Taubenfeld AJIL 1953 p. 381.

The two belligerent parties were members of the League, but Bolivia never had adhered to the Kellogg Pact. Accordingly, after the reopening of hostilities in 1932 each of them sent notes to the League protesting against the acts of the other, but neither submitted the dispute to inquiry by the Council, as they were bound to do.

⁴⁴ Cf. Walters 1952 p. 530.

⁴⁵ LoN O.J. 1933 p. 761.

⁴⁶ *Ibid.* p. 763.

⁴⁷ *Ibid.* pp. 752 ff.

⁴⁸ *Ibid.* p. 766.

would be finally compelled to make a peace of exhaustion, its plan for a settlement was likely to be closely followed. For the time being, the Commission recommended an effective embargo of arms and other war materials which were exported by the arms-manufacturing countries to the two belligerents. By August 1934 the embargo became virtually complete. But it was not before June 1935 that both nations, bleeding, ruined and exhausted, were ready to admit that victory was beyond their powers. The neighbouring countries induced them to stop fighting and demobilize their armies. An armistice was signed on June 12, 1935, which suspended firing from 12 o'clock on June 14, 1935. A Peace Conference met in Buenos Aires. The League was no longer formally associated with the proceedings. Finally, after a succession of revolution in both capitals, peace was formally signed in July 1938.⁴⁹

From the political point of view it can be said that the League, as compared with the Leticia affair, remained ineffective in the Chaco war. This is certainly due to the fact that the United States endeavoured to keep that war out of the League's jurisdiction.

From the legal viewpoint, however, the Chaco war became an interesting precedent to the distinction between formal war and material war: (1) A material war, which occurs in an international society of collective security, but which is kept out of the jurisdiction of the latter, is still liable of being converted into a formal war either by a declaration of war or by a declaration of neutrality; (2) In any such case these declarations establish a formal state of war only *inter partes*; (3) the conversion of material war into formal war by a declaration of war does not constitute a "resort to war".

For the practice of the League the Chaco war became an instance where the League assigned, with regard to Article 16, certain effects to the existence of a material war.⁵⁰

Paragraph 8. The Manchuria Incident of 1932.

The Japanese occupation of Manchuria, which began during the night of September 18, 1931, was in fact a turning point in the history of the League and its potentiality as a collective security organization.

The Japanese had a carefully prepared plan to meet the possible hostilities between themselves and the Chinese. All the forces in Manchuria, and some of those in Korea, were brought into action almost simultaneously on the night of September 18, over the whole area of the South Manchuria Railway from Changchun to Port Arthur. The Chinese troops at Antung, Yingkow, Liaoyang and other smaller towns were overcome and disarmed without resistance. In other Chinese garrisons like Kuanchengtze and Nauling at Changchun, resistance was shown and fighting began at midnight.⁵¹ On October 8, Chinchow was bombed. The Command of the Chinese North Eastern troops succeeded in

⁴⁹ State Papers 1935 p. 390.

⁵⁰ See AJIL 1934 Suppl. pp. 198 ff.; Pompe 1953 p. 44.

⁵¹ Lytton Report p. 7; cf. Eagleton 1933 pp. 253 ff.

organizing a force of considerable strength in the south-western part of Liaoning Province. These regular troops, which numbered some 35,000 men, had been able to construct a strongly entrenched position on the right bank of the Tailing River very close to the foremost Japanese outposts. This situation was relieved in consequence of certain outbreaks which occurred on November 8 and 26, at Tientsin, which led to fresh military engagements.⁵²

A new phase of the conflict started when, owing to aggressive actions of the Japanese forces — the navy being this time on the front stage — fighting broke out at Shanghai at the end of January 1932. This time the Japanese met with stout resistance put up by the Chinese 19th Route Army.⁵³ The original 3,000 blue-jackets had to be supplanted by three divisions and a mixed brigade of the Japanese Army before the Chinese forces were finally dislodged and driven back after six weeks of fighting. But the armistice at Shanghai was not signed until May 5, 1932. By February 1933 Japanese occupation of Jehol had been completed, which had been met with some resistance from the troops of Chang Hsueh-ling. In April, there was serious fighting south of the Great Wall, and to avert the threat to Peiping and Tientsin, Chiang Kai-shek accepted on May 31, 1933 the armistice agreement known as the Tangku truce. Diplomatic exchanges, which had never been totally broken, were renewed and for the next 4 years relations between the two countries remained peaceful.⁵⁴

Throughout the whole Manchurian dispute the Members of the League of Nations other than China refrained from recognizing that Japan had resorted to war in disregard of her obligations under the Covenant. The Report of the Lytton Commission, however, declared that the relations between China and Japan had the character of a 'war in disguise'.⁵⁵ This statement was specified as follows: "It is a fact that, without declaration of war, a large area of what was indisputably the Chinese territory has been forcibly seized and occupied by the armed forces of Japan and has, in consequence of this operation, been separated from and declared independent of the rest of China. The steps by which this was accomplished are claimed by Japan to have been consistent with the obligation of the Covenant of the League of Nations, the Kellogg Pact and the Nine-Power Treaty of Washington, all of which were designed to prevent action of this kind."⁵⁶

⁵² Lytton Report p. 75. At the outset of the Japanese occupation of Manchuria the Chinese Government had given orders that no resistance should be offered. From Nanking, General Chiang Kai-shek issued a message to the nation calling upon it to remain calm, maintain public order and see that no attacks were made on Japanese or other foreigners. It was, he said, hours of unprecedented gravity for the Chinese people, but they had placed the matter in the hands of the League and were confident that justice would be done.

⁵³ See LoN O.J. 1932 p. 392.

⁵⁴ Walters 1952 p. 496.

⁵⁵ Lytton Report p. 127.

⁵⁶ *Ibid.*

The underlying question in the discussions of the League about the Manchuria conflict was concerned with the meaning of 'resort to war' as considered by the Covenant. The failure of the Assembly to brand the Japanese military campaign of 1932-1933 as a 'resort to war' was due to political considerations.⁵⁷ The legal justification, however, for this procedure was backed up by the report, which the Commission of Jurists had laid down in 1923 on the meaning of war in the light of the Covenant. On either side there had been no intention to bring about a state of war. As a consequence, the question as to whether the hostilities of the Japanese forces constituted a resort to war according to Article 16 of the Covenant was left to the arbitrary decision of the League.⁵⁸ This is to say, that the existence of a material war under the era of the League was not self-sufficient in itself in order to coincide *de jure* with a "resort to war" as regarded in Article 16 of the Covenant.⁵⁹

Paragraph 9. The Ethiopian War in 1935.

On October 2, 1935, the Emperor of Ethiopia informed the Secretary General of the League of Nations "that Italian troops have violated Ethiopian frontier in region south of Mount Moussa Alli Province of Anssa between that mountain and the frontier of Ethiopia and French Somaliland and have established themselves in Ethiopian territory preparing base of extensive attack".⁶⁰ The following day the Italian Government informed the Council that owing to the order of the Ethiopian Government for general mobilization, "aggression has assumed larger proportions and a wider scope manifestly involving grave and immediate dangers against which it is essential for elementary reasons of security to take action without delay. Confronted by this situation the Italian Government has found itself obliged to authorize the 'High Command in Eritrea' to take the necessary measures of defense".⁶¹ The same day the Council was informed by the Ethiopian Government

⁵⁷ The only legal aspect with regard to the existence of war is to be found in the adoption by the Assembly of the following passage of the Lytton Report: "This is not a case in which one country has declared war on another without previously exhausting the opportunities for conciliation provided in the Covenant of the League of Nations."

⁵⁸ "Unless, in view of the failure to proceed to the application of Article 16, one is to impute to the Members of the League a clear breach of their obligations under that article, it must be assumed that they did not wish to commit themselves to the view, that Japan had resorted to war contrary to her obligations under Article 12." Lauterpacht AJIL 1934 p. 46.

⁵⁹ For a doctrinal controversy on the subject-matter cf. Borchard AJIL 1933/I p. 114; Lauterpacht AJIL 1934 pp. 43 ff. Wright suggests that the conflict between the Japanese and the Chinese at Shanghai, in which the Chinese seem to have made a striking, if not altogether successful, resistance, involves not a state of war and must, therefore, presumably be reconcilable with a state of peace and that unless the parties consider it war, it can only become such if so recognized by third States.

⁶⁰ LoN O.J. 1935 p. 1603.

⁶¹ *Ibid.*

that military air planes had that day bombarded Adowa and Adigrat and that a battle was taking place in the province of Agamè. It added that these facts involved a breach of the Covenant by Italian aggression. As it was the intention of Italy to wage her war against Ethiopia "in conformity with her obligation of a League member" she naturally refrained from a declaration of war. There was only a declaration issued on October 3rd by the Italian High Commissioner in East Africa to the inhabitants of Eritrea, which stated that "in order that your lands may not suffer from war and in order to bring aid to the numerous peoples of Tigré and other districts which ask for our intervention I have given orders for the troops to cross the Mareb".⁶² It was not until the decision of the Council on October 7 that Ethiopia invited the Italian Minister at Addis Abeba to leave Ethiopian territory.

On October 5, a Council Committee was appointed by the Council in order to "study the situation and report to the matters involved".⁶³ The same day the Ethiopian Government requested the Council to apply Article 16. After an examination of the facts the Committee came to the conclusion that the Italian Government had resorted to war in disregard of its covenants under Article 12. Furthermore it held the opinion that "when a Member of the League invokes Articles 16 of the Covenant each of the other Members is bound to consider the circumstances of the particular case. It is not necessary that war should have been formally declared for Article 16 to be applicable".⁶⁴

On the basis of this Report the Members of the Council other than the parties involved were consulted by roll-call. Fourteen of them declared their agreement with the conclusions of the Report. Accordingly, after the consultation of the contending parties, the President declared: "I take note, that fourteen Members of the League of Nations represented on the Council consider that we are in presence of a war begun in disregard of the obligations of Article 12 of the Covenant." This statement was a confirmation of the legal situation which had been previously formulated by the President in the following terms: "To-day, October 7th, five days after the opening of hostilities, the establishment of the existence of a state of war in relation to the obligations of the Covenant compels the Members of the Council to face their responsibilities."⁶⁵

Thereupon a great many of the member-States of the League proceeded to the application of the laws on war and neutrality.⁶⁶ It may be said, however, that the rules of neutral conduct which existed outside the Covenant were observed as a matter of policy, though not of

⁶² *Ibid.* p. 1224.

⁶³ *Ibid.* p. 1223.

⁶⁴ *Ibid.* p. 1225.

⁶⁵ *Ibid.*

⁶⁶ Five proposals concerning sanctions were adopted by vote of most of the Members. Four Members, however, refused to cooperate from the very beginning and assumed a position of quasi-neutrals. See Taubenfeld *AJIL* 1953 pp. 382/83.

obligation during the enforcement of Article 16 except in so far as those rules are in direct conflict with the action taken under that Article.⁶⁷

The conversion of the Ethiopian war into a formal state of war by the League and its member-States had the effect that neither the unilateral declaration of the Duce on May 5,⁶⁸ nor the virtual cessation of hostilities, were liable of terminating that war. This legal consequence was confirmed in the practice of the League, which did not consider the formal state of war with Italy to be terminated until its Resolution of May 12, 1936, where it was decided that "the Council recalls the conclusions reached and the decisions taken in this matter in the League of Nations since October 3, 1935, and decides to resume its deliberations in this subject on June 15th".⁶⁹ It is generally held that the resolution of the League Assembly in July, 1936 terminated this war, although hostilities continued and the major powers did not recognize Italy's conquest until 1938.⁷⁰

Paragraph 10. The Sino-Japanese War 1937-1945.

The new war since the signing in May 1933 of the Taug-ku Truce began on July 7, 1937, with a local skirmish close to the famous Marco Polo Bridge, a few miles outside Peiping. Alleging that one Japanese soldier was missing, Japanese troops demanded after midnight to enter the adjacent City of Wauping to conduct a search. When permission was refused by the Chinese authority, the Japanese suddenly opened an attack on Wauping with infantry and artillery forces. The Japanese extended their warlike activities to the Peiping-Tientsin area.

By July 15, it was estimated that over 20,000 Japanese troops and a hundred aeroplanes had been concentrated in this area with further reinforcements held in readiness on the other side of the great Wall. In these conditions the war between China and Japan entered upon a new and desperate stage. The actual fighting was murderous in the extreme. In the Yangtse valley the Japanese could advance only after long and obstinate battles, in which their losses were very heavy, while those of the Chinese were counted by the hundred thousand. By the end of the year Japan was in full control of the chief cities and communications

⁶⁷ Fischer Williams: *Sanctions under the Covenant*. BYB 1936 p. 145 draws this conclusion from the standpoint of the British Government which was expressed on October 23, 1935 by Mr. Eden in the following terms: "They did not consider that any covenant-breaking state had any legal right to require observance by other Members of the League of any of the laws of neutrality." At the same time, however, the British Government was observing towards Italian warships and auxiliary vessels a rule of Hague Convention XIII. Switzerland assumed the position of a neutral power, Germany even proceeded to a declaration of neutrality. The United States declared the armed conflict in Ethiopia to be war and applied their laws of neutrality.

⁶⁸ "Je fais savoir au peuple italien et au monde que la guerre est finie. Je fais savoir au peuple italien et au monde que la paix est restaurée. L'Ethiopie appartient à l'Italie." Cf. Walters 1952/II p. 681.

⁶⁹ O.J. 1936 p. 540.

⁷⁰ Cf. Wright 1942 p. 646 table 41; Grewe ZADR 1940 p. 356.

north of the Yellow River. Guerrilla warfare was springing up everywhere in the occupied provinces. Over fifty battles were fought between August 20 and September 16. The Chinese losses were estimated by the Japanese at 60,000 while the latter also lost heavily.⁷¹

On August 30, 1937, the Chinese Government had forwarded to the Secretary General of the League a summary account of what Japan had done since the outbreak of hostilities on July 7th.⁷² As Japan at that stage was no longer a Member of the League, the war between Japan and China in 1937 was no longer waged between two of its Members. Therefore, in appealing to the Council, the Chinese Government could only invoke the Article 10, 11, and 17 of the Covenant.⁷³ No declaration of war was issued. Both Japan and China chose to avoid that irrevocable commitment. Japan even firmly denied the existence of a state of war. Whereas China did not conceal that she was defending her territory against invasion and was ready to withdraw her troops from Shanghai as soon as Japan should withdraw her armed forces from Shanghai, Japan, on the other hand, contended that she was not carrying war to China but simply conducting military operations for the purpose of protecting her nationals.⁷⁴

The League equally refrained from pronouncing itself on the war in China and had limited itself to the resolution on October 5th and 6th, 1937 which expressed "its moral support for China and recommends that Members of the League should refrain from taking any action which might have the effect of weakening China's power of resistance

⁷¹ LoN O.J. 1937 p. 653. In addition to these major objectives, air operations on an extensive scale had been conducted. The Japanese had gained command of the air and had destroyed a great number of Chinese aeroplanes in the air and in aerodromes. They had not only attacked the Chinese lines of communication but had frequently bombed Chinese cities, including Nanking, Hanchow, Soochow and Shanghai, and cities as far south as Canton and Amoy, and the seaports between Hong Kong and Swatow.

⁷² O.J. 1937 p. 655. China declared that she "is exercising her natural right of self-defence, the failure of all other means of repelling violence having compelled her to resort to force which is contrary to China's wish".

⁷³ O.J. 1937 p. 906. The Chinese Government intimated that her appeal should be dealt with in the first place by the Far East Committee which had been set up after the Assembly's fateful vote on the Manchurian Conflict on February 24, 1933, and in which the United States were represented. This Committee pronounced that the plea of self-defence, which was forwarded by Japan, could not be accepted and that Japan was violating the Kellogg Pact and the Nine Power treaty. A similar statement was made by the League of Nations. The United States adopted this line at the Brussels Conference in 1937. They did not apply their Neutrality Act. Cf. Grewe ZADR 1940 p. 356; Walters 1952 p. 735.

⁷⁴ "China would have preferred to make a formal declaration. But under the latest Neutrality Act, no belligerent country might import war materials from the United States; and other supplies could be acquired only under the conditions known as cash and carry, that is to say, they could be exported only after full payment had been made, and only in non-American ships. Japan could pay for, and transport, what she needed. China could do neither. Hence she dared not make a formal declaration of war; and President Roosevelt, for the same reasons, refrained from proclaiming the existence of a state of war." Walters 1952 p. 734.

and thus of increasing her difficulties in the present conflict, and should also consider how far they can individually extend aid to China".⁷⁵ In autumn of 1938 China actually made a formal attempt to secure the application of sanctions under Article 16. Japan was invited to accept the rights and obligations of League membership so far as the Sino-Japanese war was concerned. She refused. Thereupon, on September 30, the League solemnly declared: "In view of Japan's refusal of the invitation extended to her the provisions of Article 16 are, under Article 17 par. 17 applicable in present conditions and the Members of the League are entitled not only to act as before on the basis of the said finding, but also to adopt individually the measures provided for in Article 16."⁷⁶

This implicit recognition of the existence of war would, according to the drafting and the practice of the League, have been tantamount to an official denunciation of a state of war in China, if the League at that stage were still effective. Most of its Members, however, had already announced that they no longer considered themselves bound by the strict obligations of the Covenant. It is for this reason that the Sino-Japanese war did not mature to a state of war until the outbreak of World War II when China formally declared war upon Japan. It is true that a naval blockade had been maintained over a stretch of 1,000 miles of coast-line. Yet although Japan had given notice that foreign ships carrying munitions to China would not pass safely through the blockade zone, neither side exercised belligerent rights against third powers, such as the right of visit, search and capture.⁷⁷ The attack of Japanese fliers upon the U.S.S. Panay on the Yangtze river was pretended to be due to a mistake of identity. As this explanation was admitted by the United States, the said hostile act was excluded from bringing the United States to war with Japan.⁷⁸

It is in due regard to these circumstances that the English High Court, when called upon in the case *Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantam SS. Co. Ltd.*⁷⁹ to pronounce itself on the state of affairs in China, rightly pointed out: "His Majesty's Government are not at present prepared to say that in their view a state of war exists. At the same time, I am to suggest that the question of the meaning to be attached to the term 'war' as used in a charter party may simply be one of interpreting the relevant clause, and that the attitude of His Majesty's Government may not necessarily be conclusive on the question

⁷⁵ Monthly Summary of the League 1937 pp. 197/98.

⁷⁶ LoN O.J. 1938 p. 878.

⁷⁷ Cf. L.H. Woolsey: *Peaceful War in China*. AJIL 1938 p. 317.

⁷⁸ The military acts against the U.S. included "the military bombing and sinking of the U.S.S. Panay and 3 American steamers and the machine-gunning of the refugees, the assault on the diplomatic representative of the U.S. engaged in his official duties, the entry of American property and institutions and the removal of goods and employees therefrom and tearing down, burning or otherwise mutilating of the American flag". Woolsey AJIL 1938 p. 314.

⁷⁹ See below p. 204.

whether a state of war exists within the meaning of the term 'war' as used in particular documents and statutes." According to the terms of this comment, the Foreign Office had evidently left it open to the Courts to find on the existence of a material war, if necessary.

Paragraph 11. The German invasion of Poland in 1939.

On September 1, 1939, the German military forces crossed the Polish-German frontier and invaded Poland. Military engagements between the German and Polish forces took place from the very outset of the German invasion of Poland. The Führer tried to make it out to be a police action in the Polish Corridor. He showed himself anxious to avoid the slightest allusion to the existence of a war in Poland.

It was due to the manifest ineffectiveness of the League that no appeal was made to it for the settlement of this major issue. Instead, the Allied Powers such as Great Britain and France resumed their former freedom to declare a state of war. On the very day of the German invasion of Poland the French Government remonstrated with the German Government through its Ambassador in the following terms: "Unless the German Government is prepared to give the French Government satisfactory assurance that the German Government has stopped all aggressive action against Poland and is prepared to withdraw its forces from Polish territory immediately, the French Government will not hesitate to fulfill its obligations to Poland."⁸⁰

As the German Government was not willing to comply with the French request, the French Government, on September 3, 1939, declared a state of war between France and Germany to exist with effect from 5 p.m. The British Government proceeded in a similar way. At 9 a.m. on September 3, the British Ambassador informed the German Government that unless an assurance similar to that requested by the French reached the British Government by 11 a.m. of that day, a state of war would exist between the two countries as from that hour. As no reply was received, the German representative in London was informed at 11 a.m. that a state of war existed.⁸¹

The British Empire and France merely notified the League of Nations of the fact that they were in a state of war with Germany in view of her attack on Poland. The failure of the League of Nations resulted in an integral revival of all the laws of war relative to a formal state of war. Accordingly both France and Britain declared that their notifications were made in conformity with Article 2 of Hague Convention No. III of 1907.⁸²

⁸⁰ French Yellow Book: *Documents Diplomatiques 1938-1939*. P. 325.

⁸¹ Cf. Oppenheim-Lauterpacht: *International Law*. 6th ed. vol. II p. 239 n. 2.

⁸² French Yellow Book p. 345; cf. Grewe ZADR 1940 p. 356.

Paragraph 12. The Russo-Finnish war of 1939-1940.

On the evening of November 29, 1939, the USSR broke off diplomatic relations with Finland. On November 30, Soviet aeroplanes appeared above Helsinki about 9 a.m. and bombarded the city and the neighbouring aerodrome. The same day Soviet aeroplanes also bombarded other towns, such as Viipuri, Turku, Lahti, and Kotha. Hostilities in general began on the morning of November 30, when the troops of the USSR crossed the frontier and attacked the Finnish troops at several points in the Karelian Isthmus and on the eastern frontier from Lake Ladoga to Petsamo. Furthermore, a Soviet warship bombarded the Finnish coast in the neighbourhood of the Island of Russarö but was obliged to withdraw after sustaining losses. Military hostilities were opened throughout the length of the country's frontier without any declaration of war.⁸³

On December 2, the Finnish Government appealed to the League requesting it, in virtue of Article 11 and 15 of the Covenant, forthwith to summon a meeting of the Council and the Assembly and to ask them to take the necessary measures to put an end to the aggression.⁸⁴ When invited to a meeting of the Council on December 9, the USSR, in refusing its participation, replied: "The USSR is not at war with Finland and does not threaten the Finnish nation with war. Consequently, reference to Article 11 par. 1 is unjustified. Soviet Union maintains peaceful relations with the Democratic Republic of Finland, whose Government signed with the USSR on December 2nd Pact of Assistance and Friendship. This Pact settled all the questions which the Soviet Government had fruitlessly discussed with delegates of the former Finnish Government now divested of its power."⁸⁵

A Special Committee of the Assembly, which had been charged to examine and consider the facts in relation to the legal situation "arising from the commitments by which the two countries are bound", found it "impossible to argue that the operations of the Soviet forces in Finland do not constitute resort to war with the meaning of the Pact of Paris or Article 12 of the Covenant".⁸⁶ Thereupon the Assembly reached the resolution in which it "solemnly condemns the action taken by the USSR against the State of Finland; Urgently appeals to every Member of the League to provide Finland with such material and humanitarian assistance as may be in its power and to refrain from any action which might weaken Finland's power of resistance; Authorizes the Secretary-General to lend the aid of his technical services in the organisation of the

⁸³ See Finnish Blue-White Book: *L'évolution des relations Finno-Soviétiques*. 1940 p. 92; LoN O.J. 1939 pp. 517/18. A Finnish Communist, Kuusinen, who had been an exile in Russia for 20 years, was proclaimed as head of the Democratic Republic of Finland. In that capacity he immediately signed a pact giving the Russians everything they had demanded.

⁸⁴ O.J. 1939 p. 509.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.* p. 539. Cf. H. Briggs: *The Law of Nations*. 1953 p. 976.

aforesaid assistance to Finland; And whereas the Council is competent under Article 16 of the Covenant to consider what consequences should follow from this situation, recommends the Council to pronounce upon the question.”⁸⁷

Although the Russo-Finnish war in the discussion of the League was anxiously avoided from being pinpointed as a ‘war’ and instead was generally spoken of as an ‘aggression’, it goes without saying that this decision branded Russia as having resorted to war. It remains, however, doubtful whether this decision had more of an effect than a moral condemnation. Obviously it was unanimous and effective in the formal sense, because no member voted against it. But a considerable number of members abstained, “some from fear of Russian resentment, others in their anxiety not to commit themselves to any decision which could bring them an inch closer towards actual contact with the war, whether in East or West. Of the fourteen Members of the Council, only seven actually ‘voted’ for the exclusion of Russia”.⁸⁸

Yet the application of the laws of war and neutrality was in no way questioned. Norway and Sweden refused the Anglo-French request to grant passage to their contemplated expeditionary force, and the Allies did not seriously dispute the right of the Scandinavian States to act in this manner. On March 12, 1940, a regular Peace Treaty between the Republic of Finland and the USSR was signed in Moscow, which was drafted “to enter into force immediately after its signature”. In an annexed Protocol it was concluded that “the exchange of prisoners of war shall be effected with the minimum of delay after the cessation of hostilities in accordance with a special agreement”.⁸⁹

In conclusion of the events under consideration it seems beyond doubt that the League qualified the aggression of the USSR against Finland as a resort to war and accordingly the military operations engaged in as operations of war. Yet in default of efficiency of its decisions, the League could do no more than recognize the existence of a material war. This had nevertheless the effect that, when Finland decided to have automatic contact mines laid in the coastal waters of the Aaland Archipelago, her action met with no protestation. This is to say that the situation admittedly met the case of Article 6 of the Convention relating to the Non-Fortification and Neutralisation of the Aaland Islands signed at Geneva on October 20, 1921, which stipulated that “in event of a war affecting the Baltic Sea, Finland shall have the right, in order to assure respect for the neutrality of the Aaland Islands, temporarily to lay mines in the territorial waters of these islands and for the purpose to take such measures of a maritime nature as are strictly necessary. In such a case, Finland shall at once refer the matter to the Council of the League of Nations”.⁹⁰

⁸⁷ LoN O.J. 1939 pp. 540/41.

⁸⁸ Walters 1952 p. 807.

⁸⁹ See State Papers 1940/43 pp. 383-388.

⁹⁰ O.J. 1939 p. 510.

Paragraph 13. Summary.

The practice of the League with regard to war covered the whole range of varieties between war in the formal sense and war in the material sense. On the one hand, a purely nominal state of war, as in the Polish-Lithuanian affair between 1920 and 1927, was declared to be incompatible with the spirit and the letter of the Covenant. On the other hand, the League refused to stigmatize the Japanese aggression in the Sino-Japanese war of 1937 as a resort to war.

The interpretation of the term 'war' under the League was closely dependent on: (a) the effectiveness of the League in general, and, in particular, on (b) the willingness of its members to cede their sovereignty in this respect to the League. There is little doubt that it was originally intended to cover both formal war and material war by Article 16 of the Covenant. Accordingly, at the very outset in 1921, the British Government could reasonably invoke Article 16 in drawing the attention of the League to the military incursion of Yugoslavia into Albania. But already two years later, at the occurrence of the Corfu incident in 1923, it became clear that the League members were not willing to give up their integral competence in pronouncing on any incident whether it was or was not war. They continued to keep to the traditional concept of war according to which a war is not characterized by the nature of its incident, but by the intention of the State initiating hostilities. Therefore, in the event of a clash of arms between two members of the League which was pretended on either side to be fought without *animus belligerendi*, the League's Council was entitled to avoid committing the League to sanctions by refusing to acknowledge a state of war. The only progress achieved consisted in that the Council was free to find upon the existence of a state of war *against* the will of the aggressor State, provided that a material war was in progress. Only in the Ethiopian war, however, did the League avail itself of this competence. On this occasion emphasis was given to the fact that "it is not necessary that war should have been formally declared for Article 16 to be applicable".

Although the distinction between material war and war in the formal sense was never spelled out in these terms by the League, it was nevertheless taken into consideration and given legal relevance. In the Chaco war, for example, the League held that a declaration of war did not constitute a 'resort to war' because of the fact that the said declaration had been anticipated by a material war and that the latter had been so long beyond the control of the League. Moreover, the difference between material war and formal war became relevant for the definition of the term 'act of war' and the determination of 'resort to war'.

SECTION 2. SOME COURT PRACTICE IN THE LIGHT OF "WAR IN THE FORMAL AND MATERIAL SENSES".

Paragraph 1. The Wimbledon Case.

In its general acceptance, this first judgement of the Hague Court is considered as a precedent according to which contractual international obligations must take precedence over international customary law. It is generally held that according to the circumstances of the case at issue, the conventional obligations owed by Germany in pursuance of Article 380 of the Peace Treaty of Versailles had priority upon Germany's obligations as a neutral power. This interpretation grew out mainly as a result of the dissenting opinions of MM. Anzilotti and Huber to the case. These two eminent judges, before proceeding to their arguments, assumed as their starting point the following facts:

"At the time when the steamship 'Wimbledon' was refused the right of passage, a state of war still prevailed between Poland and Russia, and Germany was therefore still in the position of a neutral. That this was the case is shown, apart from any considerations with regard to the external and internal situation of Germany, by the actual terms of the peace preliminaries and of Article 1 of the final Peace Treaty between Poland and Russia, and more especially by the fact that an armistice forming an integral part of the Peace preliminaries under Article 13 of those preliminaries, was in force until the ratification of the final Treaty; this ratification, however, had not yet taken place at the time in question."⁹¹

A close examination of the facts will prove, however, that these arguments are no longer valid for the following reasons: (1) The Russian-Polish war of 1920 constituted at no time a formal state of war; (2) Germany's declaration of neutrality had only an effect *inter partes* and was rather in the nature of a recognition of belligerency. This will be proven in the following.

As M. Schiffer pointed out before the Hague Court, there never really existed a state of peace between Russian and Polish people since the Imperial Russian Empire started crumbling, i.e., from the very time of the re-birth of Poland as a State. But the hostilities at the outset were so far off from Germany's frontiers as not to constitute a direct menace for Germany "and they did not affect either Germany's relations with her neighbours or Germany's domestic affairs".⁹² Both legally and materially the growing clash of arms between the Poles and the Bolsheviks had the characteristics of a *de facto* war. The Poles were struggling for their independence and the integration of the Ukraine in their State territory, whereas the Bolsheviks not only strove to regain the Polish occupied Ukraine but also tried to implant Bolshevik ideas to the Poles. Not only was this war never declared by either of the contending parties, but third States also failed to commit themselves in

⁹¹ P.C.I.J. Series A N° 1.

⁹² P.C.I.J. Series C N° 3 vol. 1 p. 310.

regard to the Polish-Russian fighting.⁹³ Although it is true that in 1918 the French, British, Italian and American Governments had recognized Poland as a co-belligerent of the Allied and Associated Powers in their war against Germany, the Allied Powers obviously can not be considered as co-belligerents of the Polish forces in the Russian-Polish war. Suffice it to recall that the military expeditions of Great Britain, France and Japan in Russia against the Bolsheviks were prevented from creating a state of war. Great Britain did not find it even worthwhile to enact the application of the 'Foreign Enlistment Act' for the Polish-Russian war. Germany, at the beginning of this war, behaved with equal indifference.

In reaction to the advance of Pilsudski towards Kiev, the Russian counterattack was launched in July 1920, which brought them to the outskirts of Warsaw and the borders of East Prussia. On July 30, the Russians actually went over the frontier of East Prussia and on August 3, the Diplomatic Corps left Warsaw. As a consequence Germany issued a declaration of neutrality on July 20, 1920 which declared: "In the complications that the war between the Polish Republic and the Russian Soviet Republics has engendered, Germany, who finds herself in a state of peace with both belligerents, has so far observed and will continue to observe complete neutrality. I, therefore, call on all German nationals both at home and abroad, that they must abstain from any action constituting a violation of German neutrality."⁹⁴ These terms, when compared with declarations of neutrality issued in formal

⁹³ If one should like to consider these military operations between Poles and the Bolsheviks as a war waged between two States one has to partly admit on the one hand the doctrine of 'jus postliminii' for the Poles and on the other hand the recognition of the Soviet State for that period. See the Polish Supreme Court in *Republic v. Weisholt* A.D. 1919/22 case N° 17 and *Republic v. Felsenstadt* A.D. 1919/22 case N° 16. The court construed the continuance of Poland since the Vienna Congress in the following way: "Of most of the lands taken by Prussia in the Second and Third Partitions there was formed in 1807 the Duchy of Warsaw which was in fact an independent and large Polish State. By various treaties and acts of 1815 this State, under the style of Kingdom of Poland, was 'united' (not incorporated) irrevocably (but not entirely) with Russia, whose Emperor assumed the title of King of Poland. The Kingdom of Poland was thus a separate State and was treated as such by the Russian Emperor... It followed that the separate character of the Kingdom of Poland never perished either in the consciousness of the nation or at international law, and that there thus existed before the re-establishment of the united Polish Republic... a Polish State separate from, though in union with, Russia."

There is no doubt that the customary rules of international law do not admit for any such extensive interpretation and that therefore the law in this regard had been formulated by the Swiss Obergericht Zurich in *Re M & O* A.D. 1919/22 case N° 42: "Poland was created by a fusion of German and Austrian territories with parts of Russia. No dismemberment of Russia took place, though parts of Russia broke off. Poland, as such, did not exist before she gained her independence." Cf. Marek 1954 pp. 15 ff., 417/18.

Even starting from the premise that the Polish-Russian war of 1920 was a war between States, it will be seen from an analysis of the facts, that this war at no time brought out a state of war which revives *ipso facto* the rights and duties of neutral States.

⁹⁴ Series C N° 3 vol. 1 p. 313.

wars, make it clear that the German declaration is in the nature of a municipal Neutrality Act similar to a recognition of belligerency. Such a neutrality must best be read in the light of the statement which President McKinley made in his message on December 6, 1897.⁹⁵

As the Allied Powers, however, did not consider the Russian-Polish war as a formal state of war they sent a note on September 16 to the German Government, where they prescribed the German Government to immediately dissolve all the local guards, that is, to undo the military organization that had been created in consequence of a proclamation of the President of East Prussia and was upheld in consequence of the declaration of neutrality by the German President. This Allied note had been addressed to Germany one month before the signing of a preliminary peace treaty, and at a time when actual fighting had come more or less to a standstill. The Preliminary Treaty of Peace and Armistice Conditions between Poland and Russia and the Ukraine was signed in Riga on October 12, 1920.⁹⁶ The instruments of ratifications for this Treaty had been exchanged on November 2, 1920. On March 18, 1921, the final treaty of peace had been signed at Riga, but the exchange of ratifications of the final treaty took place only on April 30, 1921. Hence as the SS. Wimbledon was refused access to the Kiel Canal on March 21, 1921, this happened after the final Peace Treaty had been signed but not ratified, and after the ratification of the Preliminary Treaty of Peace. The French Ambassador at Berlin requested the German Government one day after the latter had prevented the SS. Wimbledon to pass through the Kiel Canal to withdraw the prohibition. The German Government, however, justified its measures by Article 380 of the Peace Treaty of Versailles according to which « the Kiel Canal and its approaches shall be maintained free and open to the vessels of commerce and of war of all nations at peace with Germany on terms of entire equality ».

The Hague Court declared in its judgement that "the right of the Empire to defend herself against her enemies by refusing to allow their vessels to pass through the canal is therefore proclaimed and recognized.

⁹⁵ "The act of recognition usually takes the form of a solemn proclamation of neutrality which recites the *de facto* condition of belligerency as its motive. It announces a domestic law of neutrality in the declaring State. It assumes the international obligations of a neutral in the presence of a public state of war. It warns all the citizens and others within the jurisdiction of the proclaimant that they violate those vigorous obligations at their own peril and cannot expect to be shielded from the consequences. The rights of visit and search on the seas and seizure of vessels and cargoes and contraband of war and good prize under admiralty law must under international law be admitted as a legitimate consequence of proclamation of belligerency." *AJIL* 1907 p. 52.

A study of the political reasons which pushed Germany to the enactment of that neutrality demonstrates the submission of the facts to the definition of McKinley. Moreover on August 30, about 2,000 Poles had crossed the German frontier and later 500 more Poles. They were disarmed and interned near Prosken in Germany. On the other side, 65,000 Russians, who had taken refuge in East Prussia, were also disarmed and interned.

⁹⁶ See *State Papers* 1920 p. 1157.

In making this reservation in the event of Germany not being at peace with the nation whose vessels of war or of commerce claim access to the canal, the Peace Treaty clearly contemplated the possibility of a future war in which Germany was involved. If the conditions of access to the canal were also to be modified in the event of a conflict between two powers remaining at peace with the German Empire, the treaty would not have failed to say so".

The phrase "conflict between two powers remaining at peace with Germany" needs further comment. With regard to a conflict between two powers, which constitutes *de facto* war but does not give rise to a formal state of war, a State may either be at peace or at neutrality with the belligerent parties. While neutrality in a formal war is an imprescriptible right which international law automatically confers on third Powers being desirous of remaining out of the conflict, neutrality with regard to a material war (that is, which does not create a state of war) is a domestic act which *inter partes* brings into operation the law of neutrality.

The distinction between absolute neutrality in a formal state of war and selective neutrality with regard to a material war is certainly of concern for contractual obligations conflicting with the laws of neutrality. In principle, the laws of absolute neutrality in a formal state of war take precedence over contractual obligation. Hence, when in World War I one of the belligerents invoked, with regard to the sand and gravel transport on the Rhine, the Rhine Navigation Act, Holland, in her capacity of an "imprescriptible neutral power" could legitimately refer to her neutral duties taking precedence over contractual obligations. This, however, does not apply to the same extent in case of selective neutrality where States had the choice between the continuance of a state of peace and a state of neutrality. Here there is a presumption that contractual obligations can not be suspended by the enactment of neutrality with regard to a material war, i.e., contractual obligations take precedence over neutral obligations.

The Russo-Polish war of 1920 being legally a material war and not a formal war, the judgement of the Hague Court in the Wimbledon case is in conformity with the said distinction. The dissenting opinions of MM. Anzilotti and Huber in that particular respect are erroneous because of their generalizations. It is only with respect to the distinction of formal war and material war, that the priority in conflicts between neutral obligations and contractual obligations can be decided upon.

Paragraph 2. The Oriental Navigation Company Case (1928).

In this case the United States-Mexican Claim Commission gave judgement on an issue of insurgency.⁹⁷ It confirmed in this decision the principles of belligerency which had been established by court practice during the 19th century.

⁹⁷ AJIL 1929 pp. 434 ff.; A.D. 1927/28 case N° 361.

In April 1924 the port of Frontera and some other Mexican ports were in the hands of insurgents. The Government of Mexico declared these ports to be closed to international trade, and had officially informed the Government of the United States to this effect. The Government of the United States, however, assumed that according to international law, a port in the hands of insurgents can be closed only by an effective blockade and that accordingly it was its duty to advise American citizens that they were entitled to engage in commerce with persons in control of the ports thus closed. When the *Gaston*, an American steamship, arrived at Frontera and began unloading her cargo, a Mexican gunboat, the *Agua Prieta*, which cruised in the offing ordered the *Gaston* to put to sea. The order was subsequently repeated and accompanied by some random shots. The *Gaston*, after having unloaded only part of her cargo, and without having loaded any part of the cargo of bananas, was obliged to put to sea. The cargo of bananas became a total loss. The United States claimed before the Commission that Mexico should indemnify the company for the loss suffered by it from the action of the *Agua Prieta*.

Mexico contended that as the belligerency of the insurgents had not been recognized by any foreign Power, and that as the Federal Government of Mexico was vested with full sovereignty over all Mexican territory, the question whether the Mexican Government was entitled to order the closure of the ports was a question solely dependent upon domestic Mexican law. The Court, although rejecting the claim, did not admit that the question at stake was solely governed by Mexican law: "In time of peace, it no doubt would be a question of domestic law only. But in time of civil war, when the control of a port has passed into the hands of insurgents, it is held, nearly unanimously, by a long series of authorities, that international law will apply, and that neutral trade is protected by rules similar to those obtaining in case of war. It is clear also, that if this principle be not adopted, the conditions of neutral commerce will be worse in case of civil war than in case of war."

Viewed in the light of a 'long series of authorities', it seems beyond doubt, that the US-Mexican Claim Commission in that case, in confirming the identity of belligerency and material war, relied essentially on the following legal principles: (1) The existence of a material war in general and of a civil war in particular is not dependent on the recognition of foreign countries;⁹⁸ (2) once a material war has come into being, the rules of international law apply and take precedence over municipal law.

Paragraph 3. 'Kawasaki Kisen Kabushiki Kaisha of Kobe v. Bantham S.S.Co.Ltd.' High Court of England.

On June 2, 1936, the plaintiff, a Japanese firm, chartered from the defendants, an English firm of shipowners, a vessel on time charter. Clause 31 of the Charter party provided: 'Charterers and owners to

⁹⁸ Cf. Chen 1951 p. 345.

have liberty of cancelling this charter party if war breaks out involving Japan. On September 18, 1937, the owners, contending that war had broken out between China and Japan, cancelled the charter party and a claim was made by the charterers, which was referred to arbitration, claiming damages for breach of contract. The arbitrators appointed an umpire who found as a fact that on September 18, 1937, without a declaration of war, hostilities on a considerable scale, including a naval blockade, had broken out between China and Japan. He found that on September 18, 1937, war had broken out involving Japan. The umpire stated his award in the form of a special case asking the Court whether he was so entitled to award.⁹⁹ In a letter by the Foreign Office addressed to the Court, it was declared that "the current situation in China is indeterminate and anomalous and His Majesty's Government are not at present prepared to say that in their view a state of war exists. At the same time I am to suggest that the question of the meaning to be attached to the term 'war' as used in a charterparty may simply be one of interpreting the relevant clause, and that the attitude of His Majesty's Government may not necessarily be conclusive on the question whether a state of war exists within the meaning of the term 'war' as used in particular documents or statutes".

The English High Court by Goddard J., declared that the award of the umpire must be affirmed. The arguments for this affirmation are best to be classified under the following headings: (1) What was the intention of the concluding parties when they inserted the war clause in the charter party? (2) To what extent does international law provide for a satisfactory explanation of the meaning of 'war'? (3) How far are British courts bound to take judicial notice of a state of hostilities which amounts to material war, i.e., undeclared war?

(1) Judge Goddard said: "I have not a doubt that a captain of a tramp steamer, arriving at Shanghai, and finding the state of things described by the umpire, would have had no difficulty in recognising that a state of war existed... It is not to be expected that business men can concern themselves with the extraordinarily nice distinctions which are drawn by great international lawyers between reprisals, armed intervention, peaceful penetration and war, definitions which have probably far less importance nowadays than they may have had years ago." This statement, upon appeal, was completed by the Master of the Rolls as follows: "No doubt the authoritative statements of a government concerned in such a matter as this are matters of importance to which attention must be paid, but acts very often speak more truly than words, and it was perfectly open to the arbitrator, on the facts as found by him as to the state of affairs which preceded the relevant date and

⁹⁹ A.D. 1938/40 case N° 201. Before the Court, the plaintiffs, the charterers, contended that no state of war existed. They maintained that the term 'war' had a technical meaning and that in spite of the acts of violence on the part of Japan against China, the latter had not chosen to look upon it as a breach of the peace. Secondly, the plaintiffs contended that the question whether a state of war existed was to be decided by the Executive and not by the Courts.

were then in existence, to find that war had broken out, notwithstanding that on certain occasions certain individuals had apparently repudiated the idea that there was a war.”

(2) On dealing with the meaning of the term ‘war’ and the contention that in international law “war has no loose or popular meaning, but a technical meaning” the Master of the Rolls declared: “The only source of these principles suggested to us was the writing of various writers on international law. It is to be observed, as indeed it was to be expected, that these writers do not speak with one voice, and it is possible to extract from their pages definitions of ‘war’ which not only differ from one another, but which are inconsistent with one another in important respects. I asked for any authority in which for the purpose of the municipal law of this country ‘war’ is in any way defined. No such authority could be suggested... What precisely *animus belligerendi*¹⁰⁰ means is again a matter of great obscurity. In fact, to define ‘war’ as a thing for which it is requisite to have *animus belligerendi* is coming very near defining the thing by itself.” Recent events, it was reasonably declared, “in the world have introduced new methods and a new technique, with regard to which I conceive that writers on international law will dispute for many years to come”.

(3) The question at stake is whether judicial notices has to be taken of a war waged between two parties other than Great Britain and in regard to which His Majesty's Government had not committed itself by any means. The question was, notwithstanding certain exceptions, answered in the affirmative. “With regard to the suggestion of how inconvenient it would be if the court took one view and the executive took another on the subject, one is relieved to find in the second passage of this latter that His Majesty's Principal Secretary of State for Foreign Affairs seems to be of opinion that the word ‘war’ in the charterparty may very likely be given a different interpretation in construing that document from that which might be given to it in some public document or statute.”

The *Kawasaki* case very eloquently illustrates the insufficiency of the rigid state-of-war doctrine for the needs of modern civilization. The Court did not fail to argue its judgement on the existence of a material war. The case owes its strong authority to the fact that it was decided by the supreme court of a great sea power which is well known for scrupulously reconciling problems of that kind with a steady but slow evolution of international law.

Paragraph 4. The Corfu Channel Case with regard to the state of war between Greece and Albania.

In giving judgement on the merits in the *Corfu Channel Case* the Hague Court was bound to take into consideration the plea of Greece which was based on the existence of a technical state of war between

¹⁰⁰ Italics added.

Albania and Greece.¹⁰¹ Although no armed hostilities had taken place since the end of World War II between the two countries, the Court paid due respect to the argument of Greece that she considered herself still being engaged in a formal state of war with Albania. Said the Court: "It is a fact that the two coastal States did not maintain normal relations, that Greece had made territorial claims precisely with regard to a part of Albanian territory bordering on the Channel, that Greece had declared that she considered herself technically in a state of war with Albania, and that Albania invoking the danger of Greek incursions, had considered it necessary to take certain measures of vigilance in this region. The Court is of the opinion that Albania, in view of these exceptional circumstances, would have been justified in issuing regulations in respect of the passage of warships through the Strait..."¹⁰²

An analysis of this *obiter dictum* must account for the extreme caution which international courts generally apply in their commitments upon the existence of war. Two conclusions may, however, safely be reached from the above-quoted judgement: (1) The Court took account of the argument that Greece considered herself in a formal state of war with Albania. The legal situation as had been described and interpreted by Greece in terms of a technical state of war appeared convincing to the Court and prevented it therefore from rejecting the plea of a formal state of war as legally immaterial; (2) the Court expressed the opinion that the existence of a technical state of war, such as was invoked before it, was sufficient ground to justify the enactment of certain exceptional measures.

¹⁰¹ The historical background of this argument is found in the course which World War II took in 1940. During this year Greece was attacked by Italy, of which Albania then formed an integral part. After the end of World War II hostilities continued with Communist hands which had come from Albania, but not with the restored independent State of Albania. Yet Greece did not withhold from declaring that she still considered herself in a state of war with Albania. This was mainly due to the unsettled dispute between these two countries over the area of North Epirus and certain regions of Korca and Gjinokaster. During the Peace Conference in Paris the Greek Representative declared that the state of war between his country and Albania should find a natural and equitable solution by attributing North Epirus to Greece. Moreover, he asked for a peace treaty to be signed between the two countries. The maintenance of a state of war was reinvoked in full terms on August 28, 1946, when Greece opposed Albania to be admitted as a member to the United Nations: "Mon pays qui, même après l'élimination de toutes les forces de l'Axe, est encore avec l'Albanie, techniquement parlant, en état de guerre, demande au Conseil de Sécurité que l'Albanie ne soit pas admise au sein des Nations Unies... Et cet état continuera tant qu'un traité de paix ne sera pas signé entre la Grèce et l'Albanie." C.I.J. Serie C vol. II p. 219 (Annexes au Contre-mémoire albanais N° 16). A similar statement was reiterated on December 2, 1947, by the Greek liaison officer to the Special Commission of the U.N. for the Balkans. Cf. RevHell. 1948 pp. 173 ff. and 370 ff.

¹⁰² C.I.J., April 9, 1949. Judgements on the Merits.

SECTION 3. THE RELEVANCE OF MATERIAL AND FORMAL WAR
IN WORLD WAR II WITH REGARD TO ARMED VIOLATIONS OF NEUTRALITY.

In the course of World War II both contending parties proceeded to military occupations of neutral States which seriously intended to keep out of the war. According to Article 10 of Hague Convention V concerning the Rights and Duties of Neutral Powers and Persons in Land Warfare, "the fact of a neutral Power repelling, even by force, attacks on its neutrality cannot be considered as a hostile act".¹⁰³ Yet Article 10 does not contain any provisions as to whether, when and how a State which was hitherto a neutral may enter a war or may become involved in it.

Armed violations of neutrality may constitute formal war, material war or no war at all. Each of these modalities had its precedent in World War II and will be studied at the occurrence of the German occupation of Norway in 1940, the British-Russian occupation of Iran in 1941, and the German occupation of Denmark in 1940.

Moreover, the concept of material war has become material for the imputation of the status of 'legitimate belligerent' to partisans committing acts of armed hostilities against the occupant power. Particular consideration to this aspect has been paid in the judgements of the post World War II Military Tribunals inasmuch as they had to find upon the commission of war crimes which were said to be perpetrated against resistance movements and partisan groups.

Paragraph 1. The German occupation of Norway in 1940 created a formal state of war between Germany and Norway.

On April 9, 1940, Germany started an invasion by sea and air into Norwegian territory in order to occupy its strategical points. The Norwegian air forces at Fornebu were nearly all destroyed in an air battle. German parachute troops in large numbers took possession of the important aerodrome at Sola, near Stavanger. The Norwegian Government, which had rejected the German ultimatum, decided to oppose the German invasion by armed resistance. When the Storting assembled at Hamar the very day the Germans started their attack on Norway, a Royal Decree was issued according to Art. 68 of the Constitution, confirming the established state of war. It is only on April 24, 1940 that Germany declared by decree that a state of war existed between Norway and Germany.¹⁰⁴ From that date the existence of a formal war was recognized by the courts of these two countries and the laws of war were held to be applicable.¹⁰⁵

¹⁰³ See above p. 165.

¹⁰⁴ See Reichsgesetzblatt 1940 p. 677; U.S. Department of State IV Bulletin N° 88, p. 226; Hackworth Digest VI p. 170.

¹⁰⁵ In *The Wirpi* (A.D. 1943/45 p. 300) the Prize Court of Hamburg declared that all the rights resulting from a state of war were assumed with regard to neutrals.

The German Prize Courts held regularly that proceedings in prize were admissible against vessels and cargoes in Norwegian ports and territorial waters which were seized at the time of the invasion of Norway by German forces. The Courts rejected the argument, first that the invasion was peaceful seeing that it was not accompanied by a declaration of war and was only designed to safeguard Norwegian neutrality, and secondly, that the vessels and cargoes were therefore seized in neutral waters.¹⁰⁶

The Norwegian Supreme Court took a similar view. In *In re Five*¹⁰⁷ it gives in addition a detailed reasoning on the fact that the state of

¹⁰⁶ A.D. 1943/45 p. 288. *The Thistlebrea* became the leading case for a great number of German Prize decisions which were rendered in this regard between 1940 and 1941. In this case the Prize Court of Hamburg gave on October 4, 1940, a detailed demonstration that a state of war existed between Germany and Norway with effect from the early hours of April 9, 1940, i.e., from the moment when Norwegian forces first resisted the German action. Consequently, from that date onwards, Norwegian territorial waters were no longer neutral but enemy waters, and jurisdiction in prize was exercisable in accordance with Article 3 of the German Prize Regulations. Rowson BYB 1947 p. 174 remarks that "while this decision seems to accord with the general principles of international law, it would appear to be somewhat incompatible with the practice adopted by the German Government in September 1939 regarding the bringing into force of the right of prize".

It follows that the Hague Convention V and the corresponding Article 31 of the German Prize regulations was not applicable to the armed hostilities between Germany and Norway. In *The Edda* the Court said: "The reference to Article 10 of Hague Convention N° V concerning the Rights and Duties of Neutral Powers and Persons in Land Warfare does not affect the decision. According to this Article it is not a hostile act if a neutral Power itself repels a violation of its neutrality by means of force. The meaning of Article 10 is that no State may justify diplomatic representations, reprisals or hostile acts on the ground that a neutral Power has repelled by force a violation of its neutrality. On the other hand, Article 10 does not contain any provisions as to whether, when and how a Power which was hitherto neutral may enter a war or may become involved in it." See A.D. 1943/45 p. 288.

¹⁰⁷ A.D. 1948 case N° 162. The Court (per Eckhoff, J.) summarized the legally relevant facts as follows: "When further resistance seemed without purpose, the King on June 7, 1940, upon recommendation by the Supreme Commander, General Ruge, issued a resolution in Council to the effect that the King, the Crown Prince and the Government, the President of the Storting, officials and officers should move to an allied country in order to establish from there a legal government for Norway. The next day, June 8, the Supreme Commander started negotiations (via Stockholm) with the German High Command. In the afternoon of June 9, the Government's proclamation to the Norwegian people was broadcast from Tromsø. There it was said that the fight for the time being was given up within the country but that it was not finally given up. Immediately after came the announcement from the Supreme Commander. In this proclamation it was stated that the first part of the struggle had ended but that it would continue on other fronts with Norwegians taking part.

Shortly before the issuing of this proclamation the Supreme Command announced that Norwegian negotiators would be received and that cessation of hostilities would take place also from the German side as from midnight, Monday June 10. Two agreements were signed that day, one between General

war between Norway and Germany existed also after June 10, 1940, when the Norwegian High Command capitulated to the German forces: "What happened then was that the remaining forces in Northern Norway ceased fighting and surrendered, but that the Norwegian Government undoubtedly continued the war as the responsible leader of the country's foreign policy and defence. That is shown by the fact that immediately after the arrival in London in June steps were taken to rebuild the (Norwegian) army, navy and air force. This further led to the conclusion, in May 1941, of a military agreement with Great Britain and a number of German-occupied countries, of a proclamation stating that the war would be continued till victory was won."

The Norwegian Court reasonably relied on the existence of a formal state of war between Germany and Norway before and after the capitulation of the Norwegian military forces and in consequence was in accord with the principles of international law according to which "the fact that as soon as the war developed disadvantageously to Norway a part of the Norwegian Government left Oslo whereas another part sought liaison with the Germans, is immaterial in this case", i.e., for the continuance of a formal state of war.¹⁰⁸

Paragraph 2. The British-Russian occupation of Iran in 1941 was effected by means of a material war.

On August 25, 1941, Russian and British troops invaded Iran in order to occupy strategic points for the purpose of guarding the Iranian oil fields and securing the communication lines from the United States to Russia.¹⁰⁹ In spite of a strong military resistance which the Iranian Army offered to this invasion, the Russian and British succeeded in penetrating the inner areas of Iran. Engagements with the Iranian Army, Navy and Air Force occurred during a period of about three days. Germany was said to have stimulated the Iranian defence by promising her help if the Iranian Government would be capable of maintaining her resistance against the British-Russian occupation for the duration of one month.

Diedl, leader of the German division in the Narvik area, and a representative of the Norwegian High Command at Björnefjell, the other between representatives from the two High Commands at Trondheim. The latter was the main agreement. There it is stated: 'considering the gallant stand of the 6th Norwegian Division the following honourable conditions are laid down for the armistice: § 1. All Norwegian armed forces lay down their arms and will not for the duration of the present war again raise them against Germany and her allies...' The agreement also contained regulations concerning the delivering of arms, supplies and means of transport, release of soldiers, internment of officers, etc. For the most part the same regulations are to be found in other agreements of capitulation concluded earlier in Southern Norway and in the contemporary agreement at Björnefjell."

¹⁰⁸ Cf. also *The Island of the Prize Court of Hamburg*. A.D. 1943/45 case N° 97. See *ibid.* case N° 98.

¹⁰⁹ Cf. *Revue de droit international et de sciences diplomatiques et politiques*. 1941 pp. 250, 254, 256, 265, 267/68; Grob 1949 p. 95.

On August 28, however, the Iranian Government was obliged to ask Great Britain and Russia for a cessation of the hostilities in which she had been engaged. Thereupon a peace treaty was concluded on August 29, between the representatives of Great Britain, Russia and Iran. According to the terms of this treaty the military forces of Great Britain and Russia were entitled to occupy all the vital strategic points of Iran in order to guarantee the integrity and independence of Iran. In their return, Great Britain and Russia pledged not to interfere with the inner organization of the Iranian nation. When Iran proceeded later to intern German and Italian nationals due to a change in the government, Germany broke off diplomatic relations with Iran on September 27, 1941. On January 31, 1942, Great Britain and the USSR concluded with Iran a treaty of alliance, and on May 2, President Roosevelt announced that the United States lend-lease aid would be extended to Iran. In 1943 Iran entered into World War II as an enemy of Germany.

During the whole armed conflict in August 1941 both Russia and Great Britain on the one side and Iran on the other anxiously avoided any manifestation which might be regarded as an expression of *animus belligerendi*. Both parties, for political reasons, did not want to create a state of war. Yet the armed resistance of the Iranian troops to the Russo-British invasion of their country engaged the said countries in a material war which was terminated by a peace treaty.¹¹⁰ The British-Russian occupation of Iran in 1941 constituted a precedent where in the course of a formal war the violation of neutrality by occupation constituted no more than a material war and accordingly did not abrogate *ipso facto* the neutral status of the country invaded.¹¹¹

Paragraph 3. The German occupation of Denmark in 1940 was realized without war.

On April 9, 1940, at 04.30 a.m., a German memorandum was submitted by the German minister Reuthe-Fink to the Danish Government. This memorandum began with a series of considerations concerning alleged Franco-British plans of violating the neutrality of the Scandinavian Countries. Under the alleged circumstances Germany considered herself in the obligation to occupy strategically important points on the Danish soil. It was declared that "the German troops to not enter Danish soil with hostile intentions. The German High Command does not intend to use the points occupied by the German troops as bases for operations against Britain, so long as the actions of Britain and France shall not force them to do so".¹¹²

¹¹⁰ "Respecting rules of law on war, suffice it to point out that both Iran and USSR were parties to the Hague Convention III of 1899 Respecting the Laws and Customs of War on Land. It goes without saying that these rules of law on war applied to the Russian and Iranian military operations. The two countries thus were legally insofar at war in spite of the Russian protestation of friendship". Grob 1949 p. 95.

¹¹¹ Cf. Korovin AJIL 1946 p. 618.

¹¹² A. Ross: *Denmarks legal status during the occupation*. Acta Scandinavica 1949 pp. 3 ff.

In her reply the Danish Government took cognizance of the notification according to which "the entry into Denmark of German troops was not marked by any hostile disposition and also that the Government of the Reich has no intention through the measures they have to take, to encroach upon the territorial integrity and the political independence of the Kingdom of Denmark either now or in the future. After receiving that communication, the Danish Government in the given situation, have decided to regulate conditions in this country in consideration of the occupation that has taken place. However, they must emphatically express their strongest protest against this violation of Denmark's neutrality".¹¹³

No organised hostilities occurred between Danish and German troops when the latter proceeded to occupy Danish territory. Germany manifestly did not want to go to war with the occupied country. Denmark in her turn neither wanted to take up arms, nor to consider the German military occupation as creative of a state of war between the two countries.¹¹⁴ The fact that the Danish armed forces were allowed to remain in existence under Danish control, and the fact that the Danish State even went so far as to provide protection for the German Army against injury or unfriendly acts and demonstrations are no doubt incompatible with a state of war. Moreover the Danish administration remained intact and elections were normally held without any interference of the German authorities. Foreign relations were maintained by the Danish Government.¹¹⁵

On April 12, 1940, the German occupation of Denmark was officially announced by the British Foreign Secretary with the result that the Kingdom of Denmark, with the exception of Greenland and the Faroe Islands henceforth should be considered as 'enemy territory' within the meaning of the Trading with the Enemy Act of September 5, 1939. This is to say that the Allied powers, on a footing of reciprocity, considered that German-occupied Danish territory as an authorized theater of war for operation directed against German interests.¹¹⁶

¹¹³ Report to the Lower House of Denmark etc. p. 16 quoted from Ross *ibid.* p. 13.

¹¹⁴ Shortly after the German troops had crossed the Danish frontier on April 9, 1940, the resistance offered incoherently by some detached units of the Danish army was stopped by order of the Danish King.

¹¹⁵ Cf. Pompe 1953 pp. 23/24. Among the diplomatic acts performed during the occupation Pompe points out the protestation of the Danish King in 1944 against the declaration of independence by Iceland, occupied by the American army. "And still stronger evidence is given by Denmark's adherence in 1941, under pressure of course, to the Anti-Komintern Pact. These facts exclude the simultaneous existence of a state of war with the occupying power."

¹¹⁶ The legal status of German-occupied Denmark in 1940 finds its closest precedent in the occupation of Greece by the Allied troops in 1916, before Greece entered the war. In *Coenca Brothers v. Germany* A.D. 1927/28 case N° 389 the claimant sued Germany for compensation on account of damage suffered as the result of the bombardment of Salonika by German air forces in January 1916, when Allied occupied Greece was still neutral. It appeared that the bombardment had been carried out during the night, from a height

Yet the declaration did not imply that Great Britain regarded herself in a state of war with Denmark. 'Enemy territory' in the sense of the British declaration of April 12 refers to any territory which is under the control of a power with which Great Britain is at war.¹¹⁷ Hostile acts committed against or on 'enemy territory', if the latter is occupied by one of the belligerents, are precluded from being directed against the occupied power.¹¹⁸

The adjudication of the Danish Supreme Court corroborates the fact that the German occupation did not constitute either a formal war or a material war.¹¹⁹ Failing any declaration of war on either side or any

of about 3,000 meters and without warning. The Greco-German Mixed Arbitral Tribunal, which held Germany responsible, stated as follows:

"In general, Germany was entitled to conduct military operations against neutral Greek territory occupied by Allied troops. The occupation of Salonika by the Allied in the autumn of 1915 constituted a violation of Greek neutrality. The question whether the Greek Government protested against the occupation or whether the occupation had taken place with its express or tacit consent was irrelevant. In any case the occupation constituted an unlawful act so far as Germany was concerned, and it justified the latter in conducting on Greek territory the necessary measures of warfare. However, the fact that Germany had the right to defend herself against the occupation of Greek territory by the Allies did not absolve her from the duty of observing the established rules of international law in the matter of bombardment."

Another precedent may be found in the Russo-Japanese war in 1904/05. Russia occupied Manchuria, which belonged to neutral China. The latter did not defend Manchuria but declared that she obeyed absolute neutrality. Although most of the operations of the war were carried out in Manchuria, China succeeded in fact in maintaining her neutral status. Cf. Castrén 1954 p. 459.

¹¹⁷ Ross *Acta Scandinavica* 1949 p. 16.

¹¹⁸ When, after the French Armistice, German military aircraft began to use airports in French Indochina and the French mandated territory of Syria, the British air forces were entitled to attack them there. Cf. Castrén 1954 pp. 588/89.

With regard to Denmark the British Crown, in accordance with the particular situation, declined to seek decrees of condemnation of Danish vessels and instead, confined itself to the requisition of them for the duration of the war and undertook to return them to their owners after the war. See Lloyd's List Report, May 4, 1942. Ross declares that "it results from Denmark's position of non-belligerency that Germany's enemies could not consider Danish ships as lawful prize, according to the rules of naval warfare, nor take such measures against alien enemies. Nor could they undertake military operations on Danish territory directed against the Danish State, its institutions and authority." *Acta Scandinavica* 1949 p. 18.

¹¹⁹ It has been voiced that a war between Germany and Denmark came into existence about and after August 29, 1943. At that time an organized Danish Resistance Movement started its activities, but it is not clear whether and how it operated in connivance with the official Danish Government. Whereas the Ministry for Foreign Affairs on September 18, 1946, in an unpublished communication to be used in a lawsuit declared that there was a state of war between Germany and Denmark in March 1944, the same Ministry on the other hand, in an unpublished communication on October 5, 1946, refrained from stating from what moment a state of war might have been said to exist between the two countries. See Ross *Acta Scandinavica* 1949 p. 4 n. 4. From the standpoint of international law no such contention is defensible.

other manifestation of *animus belligerendi*, no formal state of war could come into existence. And since there was no coherent military fighting between the armies of Germany and Denmark, no material war occurred at the time of the German invasion into Denmark.¹²⁰ Hence the Danish Supreme Court stated that the conditions which reigned in Denmark in February 1943, did not warrant the application of a proviso contained in an insurance policy with regard to damages arising from the war, insurrection and civil disturbances.¹²¹ In *The Adelaide Star*¹²² the Maritime and Commercial Court of Copenhagen based its judgement on the fact that on August 24, 1940, Denmark was not at war with Germany. Moreover, it rejected the contention that in consequence of the German invasion being a breach of international law, it should be impossible to consider the seizure of *M/S Adelaide Star* as having been justified under general international law. "The unlawful invasion is actually found to be analogous with an unlawful war, e.g., one waged in patent violation of a non-aggression pact- in so far as it is bound to carry with it the legal effects of war; and also in so far as the part of international law dealing with war is concerned which intends to draw certain limits to the use of violence in times of war."

Paragraph 4. When do military actions of resistance groups in an occupied territory constitute legitimate belligerency?

The distinction between formal war, material war and no war at all, which is relevant for the determination of military invasions, is also material for the activities of resistance groups against the occupying power, once the occupation has been achieved. The term 'occupation' in this regard must be understood in its narrow sense which has been described by the Military Tribunal at Nuremberg as follows:

Whenever an invasion has developed into an occupation, is a question of fact. The term invasion implies a military operation while an occupation indicates the exercise of governmental authority to the exclusion of the established government. This presupposes

¹²⁰ Accordingly, the United States, who had decreed their neutrality with regard to the occupation of Norway, refrained from any such declaration with regard to Denmark and maintained her peaceful relations with the latter.

¹²¹ U. 1945, 1073 quoted from Ross *ibid*.

¹²² A.D. 1948 case N° 126. In this case the plaintiff, an English company, sued the defendant, a shipbuilding firm in Copenhagen, in respect of the building of a ship, the *Adelaide Star*, in Denmark. The contract was made before the Second World War and a substantial amount was paid in advance. The building of the ship was nearing completion when Germany invaded Denmark. Subsequently, in pursuance of orders issued by the German authorities, the defendants completed the ship and handed her over to the Germans. It was maintained by the plaintiffs, *inter alia*, that as the invasion of Denmark was contrary to existing treaties, such as the German Danish Non-Aggression Pact, signed on May 31, 1939, and the Pact of Paris, the war thus undertaken by Germany was unlawful; that she was therefore unable to exercise any rights thereunder. Cf. Guggenheim Lehrbuch II pp. 816 ff.; Lauterpacht BYB 1953 p. 227 n. 1.

the destruction of organized resistance and the establishment of an administration to preserve law and order. To the extent that the occupant's control is maintained and that of the civil government eliminated, the area will be said to be occupied.¹²³

Although international penal law has established a concept of 'aggressive war' which is different from the concept of war under general international law, the former nevertheless referred to the latter whenever crimes against the *jus in bello* (war crimes *stricto sensu*) were concerned. The reason is because international law does not draw all the consequences of *ex injuria jus non oritur* as far as the illegitimate initiation of war is concerned. Hence the legitimacy of military acts of resistance groups against an aggressor, after the belligerent occupation has been achieved, is not justified by the resistance against an aggressor but is dependent upon whether or not the hostile act constitutes a regular act of warfare. Viewed from the occupant power, the commitment of war crimes *stricto sensu* against members of the resistant movement depends on whether or not there was a material war in existence between the two parties, i.e., whether the acts were committed in regular belligerency.

The Military Tribunals at Nuremberg, when dealing with the legitimacy of acts against resistance groups, based their judgement mainly upon the concept of material war and therefore were explicit on the phrase of 'legitimate belligerency'.

1. *The status of Yugoslavia and Greece in 1941 and of the partisan groups operating there.*

The invasion of Yugoslavia by German troops in World War II commenced on April 6, 1941. Nine days later the Yugoslav government capitulated and on April 16, 1941, large scale military operations between the Yugoslav and the German armies had come to an end. The powers of government passed into the hands of the German Armed Forces and Yugoslavia became an occupied country. The invasion of Yugoslavia followed through into Greece. On April 22, 1941, the Greek Armed Forces in the north were forced to surrender, and on April 28, 1941, Athens fell to the invader. On and after that date Greece became an occupied country within the meaning of existing international law.

The population remained peaceful during the spring of 1941. In the early summer following, a resistance movement began to manifest itself. It increased progressively until it assumed the appearance of a military campaign. Partisan bands, composed of members of the population, roamed the territory, doing much damage to transportation and communication lines. German soldiers were the victims of surprise attacks by an enemy which they could not engage in open combat. After a surprise attack, the bands would hastily retreat or conceal their arms and mingle with the population with the appearance of being

¹²³ *Hostage Trial* A.D. 1948 case N° 215.

harmless members thereof. Ambushing of German troops became a common practice. Captured German soldiers were often tortured and killed. The terrain was favourable to this type of warfare and the inhabitants most adept in carrying it on. The German Armed Forces were able to maintain control of Greece and Yugoslavia until they evacuated them in the fall of 1944. While it is true that the partisans were able to control sections of these countries at various times, it is equally true that the Germans could at any time they desired assume physical control of any part of the country. The control of the resistance forces was temporary only and not such as would deprive the Germans of its status of an occupant.

The Military Tribunal, in the *Hostage Trial*,¹²⁴ concluded from these facts that they were consistent with Article 42 of Hague Convention IV which provides: "Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised." With regard to legitimate belligerency the Tribunal declared: "There is convincing evidence in the record that certain band units in both Yugoslavia and Greece complied with the requirements of International Law entitling them to the status of a lawful belligerent. But the greater portion of the partisan bands failed to comply with the rules of war entitling them to be accorded the rights of a lawful belligerent. The evidence fails to establish beyond a reasonable doubt that the incidents involved in the present case concern partisan troops having the status of lawful belligerents... The bands, however, with which we are dealing in this case were not shown satisfactory evidence to have met the requirements. This means, of course, that captured members of these unlawful groups were not entitled to be treated as prisoners of war. No crime can be properly charged against the defendants for the killing of such captured members of the resistance forces, they being *francs-tireurs*."

The same Tribunal, in the *Einsatzgruppen Trial*,¹²⁵ nevertheless emphatically added that it is contrary to international law, to assume that by merely characterizing a person a partisan he may be shot out of hand. To the extent that partisans are organized and engaged in what international law regards as legitimate warfare for the defence of their own country, they are entitled to be protected as combatants.¹²⁶ In particular, it was declared that "the record shows that in any of the

¹²⁴ In this trial (*In re List and Others*) the ten accused were high ranking officers in the German Armed Forces. They were charged with, inter alia, responsibility for the following crimes alleged to have been committed by troops under their command: the execution, torture and ill-treatment without trial of large numbers of innocent civilian inhabitants and hostages in Greece, Yugoslavia and Albania as reprisals for attacks by lawfully constituted enemy forces and unknown persons against German troops and installations. It was the contention of the defendants that after the respective capitulations a lawful belligerency never did exist in Yugoslavia or Greece during the period involved. The Prosecution contended just as emphatically that it did.

¹²⁵ *In re Ohlendorf and Others* A.D. 1948 case No 217.

¹²⁶ The Tribunal referred to Article I of Hague Convention IV.

areas where the Einsatzgruppen operated, the so-called partisans had wrested considerable territory from the German occupant, and that military combat action of some dimensions was required to reoccupy areas... In reconquering enemy territory which the occupant has lost to the enemy, he is not carrying out a police performance but a regular act of war. The enemy combatants in this case are, of course, also carrying out a war performance."

II. *Legitimate belligerency between the German Army in Italy and Italian partisan groups after the Italian defection in 1944.*

The question arose in the *Kappler* case¹²⁷ where a preliminary investigation was to be made into the legitimacy of an attack of Italian partisans upon a detachment of German soldiers who were marching through the Via Raselle in Rome. The Military Tribunal of Rome endeavouring to apply international law made the following declaration in an *obiter dictum*: "In March, 1944, the partisan movement has assumed large proportions, and had acquired a moderate organization. But it had not yet acquired those characteristics which would have justified conferring upon it the character of a lawful belligerent force. This is not peculiar to the Italian partisan movement... Since, generally speaking, the partisan formations arose spontaneously, their activities during the initial period were, of necessity, illegal. They became lawful only where they acquired an organization capable of being treated as a legitimate belligerent force. That stage was reached in the course of time also by the Italian partisan movement. This development shows a mass movement which, intent upon defending its liberty, begins to stir, to join hands and to organize itself against the enemy, at first illegally, owing to the nature of the situation, and then lawfully."

Referring to Hague Convention IV the Tribunal reached the following conclusion: "In the light of these considerations it is clear that the attack in the Via Rasella, whatever its importance, was an illegal act of warfare, seeing that it was carried out by a corps of volunteers who, in March 1944, did not comply with the above-mentioned conditions."¹²⁸

III. *Summary.*

Under general international law hostilities of resistance groups or partisan units in an occupied territory are not legitimate merely because of their being directed against an aggressor. The legitimacy of partisan acts depends on whether or not the partisans' hostilities are attributable to the waging of material war.

Partisan formations are regarded to be engaged in a material war with the occupant power if they (1) control a part of the invaded country so effectively as to deprive the occupying power in that part of the

¹²⁷ A.D. 1948 case N° 151.

¹²⁸ The accused was charged with having ordered the killing of 335 hostages in the Ardeatine caves following that attack by irregular forces upon a detachment of German soldiers.

country of its status as an occupant; (2) have acquired an organization capable of being treated as a legitimate belligerent force.¹²⁹ The legitimacy of partisan activities will then be determined by the laws of warfare. It follows that members of such partisan groups have the status of legitimate belligerents, that a captured partisan must be treated as a regular prisoner of war and can be executed for war crimes *stricto sensu* only after a fair trial.

If the control of an area by partisans is temporary only and does not deprive the occupying power of its potential control in that region, their hostile activities against the occupant power must nevertheless be considered as *legitimate belligerency* provided that the former comply with the rules of warfare.

¹²⁹ Switzerland assumed the following position with regard to the 'Forces Françaises de l'Intérieur' after the entrance of the Allied Powers on French soil: "Während der Befreiung Frankreichs sind zahlreiche Morde und summarische Exekutionen an schweizer Staatsangehörigen begangen worden. Der Geschäftsbericht des Bundestages bemerkt hiezu, dass die von den 'Forces françaises de l'intérieur' begangenen Akte solchen der regulären Armee gleichzustellen sind. Die Schweiz hat auf Grundlage des Völkerrechts und der Haager Landkriegsordnung nicht nur die Bestrafung der Schuldigen und Rehabilitierung der Opfer, sondern auch Schadensersatz verlangt." Rapport du Conseil Fédéral sur la gestion 1947 p. 9, quoted from SJIR 1948 p. 170.

CHAPTER VII

THE SCOPE OF MATERIAL WAR AND FORMAL WAR IN CONTEMPORARY INTERNATIONAL RELATIONS.

The practice of States between the two World Wars abundantly proves that war continued to exist in fact and that in all those cases where the existence of a state of war was vigorously denied, the armed conflict in progress was nevertheless recognized in many respects as relevant under international law and was increasingly delineated as *material war*. The inevitability of taking material war into consideration in international relations was even reflected in certain conventions relative to war. Thus, the conventions signed at Buenos Aires in December 1936 envisaged both *war* and *virtual state of war*.¹ Moreover, the traditional demarcation between international war and civil war became meaningless in cases where international conflicts could be regarded under the aspect of a civil war and *vice versa*. States had recognized the Russo-Polish war in 1920 as *de facto* war without considering its legal character as either a civil war or an international war. There was the Fiume coup of d'Annunzio and his 'war' with Italy, fighting in the Burgenland and the Polish military action in Vilna which were regarded as wars in the material sense without any further legal specification.²

Later on the concept of 'material war' covered such situations as the military contest arising from Japan's actions against China in 1932 and 1937. The term was applied to such large-scale fighting as took place from 1937 through 1939 between Russian and Japanese forces along the Manchurian border where, in 1939 in one battle alone, the Japanese admitted 18,000 casualties. The reason for the qualification of all these events in terms of 'material war' was that neither belligerent wished to be called 'aggressor' under the Pact of Paris and therefore refrained from admitting a formal state of war to be in existence.³ On the other hand the Spanish Civil War which in 1937 evolved a quasi-international war, was equally dealt with in international relations as material war. It was the Spanish Republican government itself which, in addressing the British government in its note of February 3, 1938, justified expressly

¹ See AS Proceedings 1938 p. 121.

² Cf. Kunz AJIL 1951 p. 47.

³ Cf. Gottschalk ZfV 1933 pp. 188 ff.; C.W. Tinch: *Quasi-War between Japan and the U.S.S.R. 1937-1939*. World Politics 1951 vol. VIII pp. 174 ff.

its complaints of unlawful aerial bombing by General Franco's military forces on grounds of its *concepción de la guerra*.⁴

It stands to reason that for the purpose of the following doctrinal investigation and outlining of the institutionalization of material war, civil war and international war can to a large extent be dealt with indiscriminately, provided that both are prevented from creating a formal state of war. This holds good so much the more since any such civil and international wars are very often considered under the common denominator of 'belligerency'.

SECTION 1. 'MATERIAL WAR' HAS BEEN RECOGNIZED IN THE PROVINCE OF INTERNATIONAL LAW UNDER THE ASPECTS OF 'WAR' AND 'BELLIGERENCY'.

Paragraph 1. The recognition of belligerency presupposes the existence of material war.

I. *The role of belligerency in international law.*⁵

The legal status of belligerency has been considered mainly with regard to third States facing the recognition of a civil war. It follows that the concept of belligerency was generally conceived as the result of recognition which third States pronounced in favour of the seditious party in a civil war. It has been pointed out that in all works prior to 1865 nowhere was the term 'recognition of belligerency' mentioned and there was no indication in the opinions of writers of States in the early half of the 19th century that any decided line of distinction could be drawn between recognized and unrecognized belligerents.⁶

Any true analysis of the subject-matter must start out from the premise that belligerency needs to be previously defined before the question can be examined as to whether or not third States are entitled under international law to proceed to its recognition. Dana, in formulating the conditions with regard to the existence of belligerency in a civil war, declared:

⁴ Note of the Spanish Minister of National Defence to the British Government concerning the bombardment of Barcelona; cf. J. Molares: *El bombardeo de ciudades abiertas*. 1938 p. 24.

⁵ Cf. A. Rougier: *Les guerres civiles et le droit des gens*. 1902; A. Rolin: *Le droit moderne de la guerre*. 1920 vol. I pp. 201 ff.; W.L. Walker: *Recognition of Belligerency and Grant of Belligerent Rights*. Grotius Transactions 1937 pp. 177 ff.; H.A. Smith: *Great Britain and the Law of Nations*. 1932 vol. I pp. 261 ff.; F. Pflüger: *Die einseitigen Rechtsgeschäfte im Völkerrecht*. 1936 pp. 75 ff.; H. Wehberg: *La guerre civile et le droit international*. RdC 1938/I pp. 2 ff.; H. Lauterpacht: *Recognition in International Law*. 1947; Chen 1951 pp. 333 ff.

⁶ Walker, Grotius Transactions 1937 p. 178. Lawrence-Winfield declared: "All war is now public war. Even the military and naval operation of revolted provinces or colonies have a public character impressed upon them by the process known as *recognition of belligerency*." To a similar effect R. Le Normand: *La reconnaissance internationale*. Thèse Rennes 1899 p. 221; Noël-Henry: *Les gouvernements de fait devant le juge*. Thèse Paris 1927 p. 25 both quoted in Pflüger 1936 p. 176 n. 186.

It is certain that the state of things between the parent state and insurgents must amount, in fact, to a war, *in the sense of international law*, that is, powers and rights of war must be in actual exercise.⁷

Numerous examples have been set in the practice of States which give evidence that the factual circumstances are decisive in justifying the evaluation of an original upheaval in terms of war and the recognition of the contending parties as belligerents. As early as 1825 the British government informed its ambassador Sir Stratford Canning that with regard to the Greek war of independence

a certain degree of force and consistency acquired by any mass of population engaged in war entitled that population to be treated as a belligerent.⁸

As a rule, the preliminary conditions which are deemed to transform a civil strife into a regular belligerency are laid down by the concept of war in the material sense. They can be summarized as follows:

(1) the existence of political *de facto* organization on either side of the parties involved in an armed conflict, i.e., an organization of sufficient consistency in order to give effective rule to its commands;⁹

⁷ Wheaton-Dana: *Elements of International Law*. 1866 p. 23 n. 15.

⁸ Hall: *International Law*. 4th ed. 1895 quoted in H. Wehberg: *Guerre civile et droit international*. La Crise Mondiale 1938 p. 185. Cf. J.P. Weber: *Problèmes de droit international public posés par les guerres civiles*. 1940 pp. 172 ff.

⁹ Dana declared that the political organization of the insurgents in the event of a civil strife must be sufficient in "character, population and resources to constitute, if left to itself, a State among nations, reasonably capable of discharging the duties of a State"; see Chen 1951 p. 369. This view is set as a guiding principle for States in their recognition of belligerency in a civil war and is said to be shared by numerous writers, by the Institute of International Law as well as by Anglo-Saxon State practice.

Count Cavour observed in 1858 to Count Gropello: "The fact that a revolt was committed by passengers on board the vessel, that she was for some time in their power, and that during such time she became the instrument of a culpable aggression, could not constitute that state of war which can exist solely between Governments recognized *de facto*." *Fontes*, No. 2420.

There is much doubt whether the Court, in *The Three Friends* (Mex. US Claim Commission; Moore, *International Arbitrations* III pp. 2886) acted in conformity with international law when it went so far as to consider already 'serious civil disturbances accompanied by Spain' as 'war in the material sense' for the purpose of neutrality enacted by the United States of America in Section 5283 of the Revised Statutes. See Hackworth, *Digest I* p. 358.

During the years 1869-79, the United States Government, despite pressure of public opinion sympathetic to the rebels, consistently refused to recognize belligerency, mainly because there was no organized insurgent government which could be dealt with as an independent political authority. Thus President Grant in his annual message to Congress declared in 1869: "The question of belligerency is one of fact, not to be decided by sympathies for, or prejudices against either party. The relations between the parent State and

(2) the continuance of hostilities as evidenced by a certain amount of time;¹⁰

(3) the capacity of either party to act in accordance with the rules and customs of warfare.¹¹

II. *The legal implications of the recognition of belligerency by third States.*

The recognition of belligerency by a third State is a legal act which is both declaratory and constitutive.¹² The act is declaratory inasmuch

the insurgents must amount, in fact, to war in the sense of international law. Fighting, though fierce and protracted, does not alone constitute war, there must be military forces acting in accordance with the rules and customs of war — flags of truce, cartels, exchange of prisoners, etc. — to justify a recognition of belligerency there must be, above all, a *de facto* political organization of the insurgents." See also *Pasquerias y Secaderos de Bacalao de España, S.A. v. Beer*, A.D. 1949 case No. 119.

¹⁰ "If after the lapse of a reasonable period there be little prospect of a termination of the struggle, especially if this be carried on upon the ocean, a recognition of the parties as belligerents appears to be justifiable." *Fontes* No. 2484. Mr. Fish declared in the Anglo-American dispute on the American Civil War: "...actual hostilities might have continued to rage in the theatre of insurgent war; combat after combat might have been fought for such a period of time; a mass of men may have engaged in actual war until they should have acquired the consistency of military power — to repeat the idea of Mr. Canning — so as evidently to constitute the fact of belligerency, and to justify the recognition by the neutral." *Fontes* No. 2487.

The recognition, however, of the "handful of followers under the lead of General Garibaldi as a belligerent power" was refused, amongst others, by the lack of the "time element". Cf. *Fontes* No. 2487.

When, in 1893, the Brazilian fleet revolted and attempted to blockade Rio, it was prevented by the warships of the United States and other powers on the ground that such a precarious and short-lived association lacks any competence to wage war under international law. Cf. H. Taylor: *A Treatise on International Public Law*. 1901, p. 449.

The hostilities between Italian and Albanian troops which occurred on 7 April 1939 when Italy entered Albania, were not considered as war because of the lack of the time element. See J. Spiropoulos: *Sur l'existence de l'état de guerre entre la Grèce et l'Albanie*. RevHell 1948, who observes (pp. 371/72): "Le débarquement des troupes italiennes en Albanie constitue un cas d'intervention armée dans les affaires intérieures d'un Etat tiers. Etant donné que l'action militaire italienne ne visait pas à la création d'un état de guerre entre l'Italie et l'Albanie et que la résistance pendant quelques heures de quelques unités albanaises n'a pas eu cet effet, le changement intervenu dans l'organisation intérieure et extérieure de l'Albanie s'est produit sans guerre, bien qu'à la suite d'actes de violence."

¹¹ In the American Civil War the attitude of the British Government was justified by the statement that it could not treat 5,000,000 men who had declared their independence like a band of marauders or filibusters. "If we had done so, we should have done more than the United States themselves. Their troops had taken prisoners many of the adherents of the Confederacy, but I could not perceive from the newspapers that they had brought these prisoners to trial for high treason or shot them as rebels." Lord Russell to Lord Lyons, June 21, 1861; *Fontes* No. 2465. Cf. Pfluger 1936 p. 176.

¹² The opposition between the constitutive and declaratory theories on the subject-matter has no real foundation.

as the recognizing State confirms by it that the factual conditions of a material war are in existence. It is on this ground alone that a third State can proceed to recognition without a violation to comity of the parent State. In the event that the preliminary existence of material war could not be justified, the recognition of belligerency would constitute an illegal intervention in the domestic affairs of the parent State.¹³

Any recognition of belligerency is also a constitutive act because it gives effect to a new legal status between the recognizing State and the belligerent parties. So long as no recognition is made the relations between third States and the parent State continue to be determined by the law of peace. Yet from the recognition of belligerency onwards the relations between the recognizing State and the belligerent parties will be determined by the law of neutrality.

A foreign State which recognizes the belligerency of a party to a domestic conflict thereby changes the status of the parties concerned ... assuming for itself the rights and obligations of neutrality.¹⁴

In practice third States have been guided by the rule that belligerency ought to be recognized when (a) the political struggle has attained a certain magnitude; (b) the armed contest constitutes a material war and (c) the interest of the recognizing State is effected.¹⁵ Every sovereign power decides for itself, on its responsibility, the question whether or not it will at a given time accord the status of belligerency to the insurgent subjects of another power.¹⁶

The consequences of an attribution by foreign States of belligerent rights to fighting insurgents are entirely analogous to the consequences of a declaration by foreign States of neutrality in case of hostilities considered as 'short of war' by the parties involved. The non-recognition of the existence of war by the lawful government, that is the attacked party, is in a civil war precisely the characteristic

¹³ J. Lorimer: *The Institutes of the Law of Nations*. 1883/II p. 143 observes with regard to the *Alabama* case: "Belligerent existence was a fact... By ignoring it, neutral States would have abandoned the basis of fact of which all jurisprudence rests." Cf. Pfluger 1936 p. 182.

¹⁴ G.G. Wilson: *Insurgency and International Maritime Law*. AJIL 1907 p. 53. Cf. G. Scelle: *La reconnaissance des insurgés de la guerre espagnole*. FW 1937 p. 88; Weber 1940 pp. 161/62.

¹⁵ The recognition of belligerency involves not only a recognition of a fact, but also questions of policy touching many considerations other than those consequent upon the simple existence of hostilities. See Wilson AJIL 1907 p. 60. Lauterpacht 1947 p. 183 declares that "recognition may be unjustified and incapable of being the subject of a valid claim for the reason that the conflict does not affect outside States to a degree warranting recognition. This was the position, for instance — so far as Great Britain and the United States were concerned — in the case of the Polish rebellion against Russia in 1831 and of the Hungarian revolution in 1848." Cf. Stödter 1948 p. 115; *Fontes* No. 2487 p. 125.

¹⁶ Cf. *Fontes* No. 2487.

element of the situation. Recognition of the belligerency of the rebellious party, even if given by all other States, cannot by itself alter this, no more than the declarations of the one State can have consequences for the relations between third States and the combatting parties in the case of hostilities short of war.

The essential difference between a declaration of neutrality in case of hostilities and the recognition of belligerency lies naturally in the fact that the latter does not establish interstate relations between the belligerent insurgents and the neutral State. Recognition of belligerency does not contain the normal international recognition of a State ... While declarations of neutrality in the case of hostilities short of war belong to a rather recent period, recognition of belligerency has frequently occurred in former centuries and has often given rise to a war between the recognizing State and the State involved in civil war. It was one of the chief purposes of the Holy Alliance to safeguard the established governments against outside interference in civil wars.¹⁷

The recognition of belligerency which brings about *inter partes* the effects of a formal war may be declared either by the parent State or by third States.¹⁸ In pursuance of that recognition the belligerent parties are entitled to the rights and duties flowing from a state of war but only with regard to the recognizing State.¹⁹

According to positive international law no duty has yet been established for third States to recognize belligerency if the facts give evidence of the existence of war in the material sense.²⁰

¹⁷ Pompe 1953 pp. 13/14.

¹⁸ No preliminary recognition of the parent State is necessary in order to entitle third States to proceed to recognition: for an opposite opinion see Q. Wright: *Changes in the Conception of War*. AJIL 1924 p. 759: "Third States are not entitled to consider war in the legal sense as existing unless the parent State by some overt act, such as a declaration of war, enforcement of belligerent rights against neutrals or conduct of military operations on such a scale that neutral interests are necessarily affected, manifests an intention to make war."

¹⁹ When in the course of World War I a Polish Army was created which was recognized as belligerent on 5 October 1918, the British Minister agreed to "henceforth recognize the Polish Army as autonomous, allied and co-belligerent." The Permanent Court of Justice spoke of that recognition by the Allied Powers as not conclusive upon Germany. Cf. Harvard Draft Convention AJIL 1939 Suppl. p. 209; Pfluger 1936 p. 182; Chen 1951 p. 303; Woolsey AJIL 1950 p. 354. See D. Antokoletz: *Tratado de Derecho Internacional Publico*. 1944/III p. 646.

²⁰ It is *de lege ferenda* that an obligation is said to exist for third States to recognize belligerency from the moment that material war has come about. Cf. Westlake: *International Law*. 1910/I p. 53; Rougier 1902 pp. 402 ff.

III. *Guerrilla operation and belligerency.*²¹

The term *guerrilla* has been subject to much loose characterization and is confusingly used on controversies upon lawful and unlawful combatants.²² A clear distinction must be drawn between guerrilla tactics and the so-called guerrilla war. The former presupposes a military operation in progress which is conducted in accordance with the laws of open warfare. Guerrilla tactics then mean hostile activities committed by small bodies of regular soldiers or individual soldiers who act in the rear of the enemy's lines either by being dropped from planes or by some other way. To the extent that such acts are in immediate relation with the principal military operation of their army, such groups or individuals are considered as lawful belligerents if their membership to the ordinary army is patent. Otherwise their activities will be considered as so-called "unprivileged acts of war".²³

The question of 'guerrilla war' arises when a territory is invaded and fully occupied. The tendency which was predominant in the nineteenth century was to brand as unlawful the activities of groups continuing the struggle after the national territory had been totally occupied by the enemy.²⁴

Under modern international law such guerrilla activities are deemed to become legitimate belligerency from the moment that they acquire the characteristics of a material war. Guerrilla war in the material sense has been said to be in existence if the guerrilla fighters (1) control so effectively a part of the invaded country as to deprive the occupying

²¹ Cf. Nurick-Barrett: *Legality of Guerrilla Forces under the Laws of War*. AJIL 1946 pp. 563 ff.; I.P. Trainin: *Questions of Guerrilla Warfare in the Law of War*. AJIL 1946 pp. 534 ff.; Stowell AJIL 1942 pp. 646/47; Stone 1954 pp. 564 ff.

²² Cf. G.G. Wilson: *The Guerrilla and the Lawful Combatant*. AJIL 1943 p. 494; Maurach 1949 p. 754: "Die völkerrechtliche Zulässigkeit des sog. Partisanenkrieges als solchen ist bekanntlich noch nicht einwandfrei geklärt. Zum Teil trägt dazu die sehr unbestimmte Bezeichnung bei; denn unter "Partisanenkrieg" lassen sich die verschiedensten Methoden des Widerstandes von der Sabotage bis zum Grossraumkrieg zusammenfassen. Die Frage der völkerrechtlichen Zulässigkeit des Partisanenkrieges muss daher konkret, für jeden Kriegsschauplatz gesondert, gestellt werden.

²³ In the course of the Korean war "guerrilla operations conducted by enemy bands of from 50 to 2,000 have been relatively intense south of the 39th parallel. Such bands carry out frequent raids on defenseless towns and villages, and harass small military convoys and units. UN forces in affected areas destroy or disperse these bands when they show themselves". UN Doc. S/1885 8th Report of the UN Command (1950) p. 3. Cf. also Nurick-Barrett AJIL 1946 p. 569.

²⁴ Cf. Oppenheim-Nair 4th ed. 1928 Sec. 60; Stowell AJIL 1942 pp. 646/47. R.E. Dupuy: *The Nature of Guerrilla War*. Pacific Affairs 1939 p. 138 ff. observes in a historical and military study upon guerrilla war that "having no organized base, guerrillas can take no prisoners. They can release captives or kill them".

power in that part of the country of its status as an occupant, and (2) they comply with the rules of war.²⁵

The principles which determine belligerency of guerrilla activities are the same for the partisan warfare which has become the by-product of wars fought on a world-wide scale. As partisan activities have become very effective in total war it has also become more important for the invading and occupying forces to prevent the commission of partisan acts.²⁶ In the event that they are insufficient to constitute material war it has been maintained that such activities deserve the qualification of "unprivileged belligerency". According to the principle of "unprivileged belligerency" such activities are not criminal under international law but the actor merely forfeits protection given by international law to regular combatants. It follows that partisans ought not to be punished without judicial trial.²⁷

Paragraph 2. Insurgency and belligerency in a civil war.

1. State practice with regard to the American Civil War: A pattern for the analysis of civil war into its stages of material war and formal war.

The outbreak of the American Civil War in 1861 and the recognition of the belligerency of the Confederate States by a number of European powers has been most widely discussed in State practice and legal doctrine and has contributed a great deal to the modern development of civil war in legal theory.²⁸

Early in 1861, seven of the States of the USA seceded from the Union, and set up a new Constitution, with a President and Legislature. Military forces were organized and hostilities broke out on 11 April 1861. On 19 April, President Lincoln issued a proclamation declaring a blockade of the entire coastline of the seceding States. On 6 May, Lord

²⁵ See above p. 215. In the Rapport de la Croix-Rouge 1947 2^e session p. 42 the status of prisoners of war was proposed in the event that "des individus en territoire forment une organisation militaire pour résister à la Puissance occupante et gagnent le contrôle effectif, même temporaire d'une région quelconque ... à condition (1) qu'ils se trouvent sous les ordres d'une personne responsable; (2) qu'ils portent habituellement et de façon constante un signe fixe et distinctif, reconnaissable à distance; (3) qu'ils portent ouvertement les armes.

²⁶ Stowell AJIL 1942 p. 647. Lauterpacht BYB 1953 p. 213 defends a greater leniency with regard to guerrilla warfare on the ground that in "modern, — global — warfare the complete occupation of a country may be but an episode in the campaign in which the legitimate Government, though compelled to withdraw from national territory, continues to fulfil its responsibilities in conjunction with its allies".

²⁷ Cf. Rapport de la Croix-Rouge 1947 2^e session p. 42; Stowell AJIL 1942 pp. 643, 647; Baxter BYB 1951 pp. 342 ff.; Stone 1954 p. 562/63.

A proposal that individuals taking up arms against a belligerent conducting aggressive or illegal hostilities, should be treated as prisoners of war under the Geneva Convention of 1949 was not adopted. Cf. Gutteridge BYB 1949 p. 314; Stone 1954 p. 654.

²⁸ Cf. Lauterpacht 1947 p. 187.

Russell held the view that 'a civil war has broken out between the several States of the late Union' and gave the following instruction to the British ambassador in Washington (Lord Lyons):

The question for neutral nations to consider is, what is the character of the war; and whether it should be regarded as a war carried on between parties severally in a position to wage war, and to claim the rights and to perform the obligations attaching to belligerents?

Her Majesty's Government consider that that question can only be answered in the affirmative. If the Government of the Northern portion of the late Union possesses the advantages inherent in long-established Governments, the Government of the Southern portion has, nevertheless, duly constituted itself, and carries on in a regular form the administration of the Civil Government of the States of which it is composed.²⁹

On 14 May the British Government published a proclamation of neutrality³⁰ which was followed by France on 10 June, the Netherlands on 16 June, Spain on 17 June and Brazil on 1 August. The United States of America not only considered these declarations of neutrality as premature but entirely contrary to the law of nations:

It is erroneous, so far as foreign nations are concerned, to suppose that any war exists in the United States. Certainly there cannot be two belligerent powers where there is no war. There is here, as there has always been, one political power, namely, the

²⁹ *Fontes* No. 2458. The French view is expressed in the letter of M. Thouvel to M. Mercier on 11 May 1861 (*Fontes* No. 2459): "Il est certain que, fondée ou non à agir ainsi, une portion notable de l'Union américaine s'est constituée en confédération séparée, et que cette confédération, maîtresse de vastes et riches contrées, usant de toutes les ressources et de tous les moyens d'administration dont elles étaient individuellement en possession, a placé à sa tête une autorité incontestée là où elle s'exerce, et qui, par l'espèce de régularité avec laquelle elle fonctionne, revêt aux yeux des puissances étrangères toutes les apparences d'un gouvernement de fait. Dès lors, il faut bien reconnaître que dans de telles conditions, et quels que soient ses regrets d'un semblable état de choses, le Gouvernement de l'Empereur ne peut considérer les deux parties contendantes autrement que comme deux belligérents employant l'un contre l'autre les forces dont ils disposent, conformément aux principes du droit des gens. Déjà des deux côtés, on a décrété les mesures de coercition qu'on s'est jugé en droit de prendre en qualité de belligérant."

³⁰ British declaration of neutrality, *State Papers* 1860/61 p. 165:

"Whereas we are happily at Peace with All Sovereigns, Powers, and States,

"And whereas hostilities have unhappily commenced between the Government of the United States of America and certain States styling themselves the Confederate States of America,

"And whereas we, being at Peace with the Government of the United States, have declared our Royal determination to maintain a strict and impartial neutrality in the contest between the said contending parties."

United States of America, competent to make war and peace, and conduct commerce and alliance with all foreign nations. There is none other, either in fact, or recognized by foreign nations. There is, indeed, an armed sedition seeking to overthrow the government, and the government is employing military and naval forces to repress it. But these facts do not constitute a war presenting two belligerent powers, and modifying the national character, rights and responsibilities, or the characters, rights and responsibilities of foreign nations. It is true that insurrection may ripen into revolution, and that revolution thus ripened may extinguish a previous existing State, or divide it into one or more independent States, and that if such states continue their strife after such division, then there exists a state of war affecting the characters, rights and duties of all parties concerned. But this only happens when the revolution has run its successful course.³¹

Thereupon the United States of America were informed by their ambassador in London that the legal questions involved had been referred by the British Government "to those officers most conversant with them, and their advice had been taken in shaping the result. Their conclusion had been that, merely as a question of *fact*, a war existed".³² The controversy then turned on the problem as to when belligerency might be recognized without offense to the parent State.

An insurrection extending over nine States in space, and ten months in duration, can only be considered as a civil war, and that persons taken prisoners, on either side should be regarded as prisoners of war. Reason, humanity, and the practice of nations, require that this should be the case.³³

A demand on the part of the USA to submit the question of premature recognition of belligerency to arbitration was categorically refused by the British government which declared that

with regard to ... the alleged premature recognition of the Confederate States as a belligerent Power, it is clear that no reference to arbitration is possible. The act complained of, while it bears very remotely on the claims now in question, is one as to which every State must be held to be the sole judge of its duty; and there is, ... no precedent for any Government consenting to submit to the judgment of a foreign Power, or of an International Commission, the question whether its policy has or has not been suitable to the circumstances in which it was placed.³⁴

³¹ *Fontes* No. 2463.

³² *Ibid.* No. 2461.

³³ *Ibid.* No. 2469.

³⁴ Lord Stanley to Sir F. Bruce (Washington) 30 November 1866, *Fontes* No. 2453.

According to the opinion of the European powers the end of the American Civil War was to be determined by the cessation of military hostilities.³⁵

II. *The distinction between insurgency and belligerency is analogous to that between material war and formal war.*

A. The relativity of international war and civil war.

At the occurrence of the American Civil War the British government made a statement with regard to the existence of war, the authority of which has been confirmed in modern international law:

The fact that the war now existing in North America may, in a certain sense, be viewed as a civil war, and that the President speaks of 'the insurrection' of the particular States named in the Proclamation, does not appear to Her Majesty's Government to make any very material or practical difference, more especially as Her Majesty's Government, and all other Governments, have treated both parties as 'belligerents' engaged against each other in regular war, and consider themselves as 'neutrals' internationally.³⁶

It may be said that civil wars have been in fact more frequent than wars between independent States.³⁷ In some periods of history, the distinction is not easy to draw in practice. It becomes, however, an imperious necessity as soon as sovereign States agree to respect the independence of each other. International war is then roughly the war between such States, while civil war is declared to be the intestine conflict between groups included in one of them. At the beginning of the nineteenth century the Holy Alliance founded the new international order, called the family of nations, on the principle of mutual assistance.³⁸ But State practice in the first half of the century was dominated by conflicting interests with regard to a possible intervention in civil

³⁵ See Earl Russell to Sir F. Bruce on 2 June 1865 (*Fontes* No. 2478): "Her Majesty's Government have accordingly, after communication with the Government of the Emperor of the French, determined to consider the war which has lately prevailed between the United States and the so-called Confederate States of North America to have ceased *de facto*; and on that ground, they recognize the re-establishment of peace within the whole territory of which the United States, before the commencement of the civil war, were in undisturbed possession."

³⁶ Earl Russell to Lord Lyons (Washington) 3 October 1861, *Fontes* No. 2431.

³⁷ Cf. Dickinson 1920 pp. 7/8. From a sociological point of view that author observes that "in international law the parties contending do not recognize one another as belonging to a single community, in civil war they do. These two kinds of war may have many features in common, but their causes and objects are different".

³⁸ The last instance of an official intervention on the part of the Holy Alliance in a civil war was the French 'expedition' to Spain in 1823. Cf. R. Robin: *Des occupations militaires en dehors des occupations de guerre*. 1913 pp. 183 ff.

wars. While the legal doctrine of the whole century was anxious to defend the *credo* into a clear-cut legal borderline between civil war and international war, history of that period gives evidence only of rare instances where a styled civil war bore also the necessary features in law.

In a great deal of all civil wars which occurred since the nineteenth century, third Powers had their active part either on the side of the parent State or on the side of the insurgents. Although in the latter event there was indeed armed conflict between States, such a conflict was not, for political reason, considered international. The same is true for an armed conflict such as at the occurrence of the 'civil war' in Austria in 1848-49 where for a very long period the Russian army was exclusively fighting against the Hungarian nation.

In modern times the relativity between civil war and international war has become more evident.³⁹ Experience with regard to the Spanish Civil War between the two World Wars gave evidence to the fact that a civil war can acquire in our times all the characteristics and the significance of an international contest.⁴⁰ This was emphatically expressed before the Council of the League of Nations at the occurrence of the Spanish Civil War.⁴¹

B. Rebellion, Insurgency and Belligerency.

There is a general tendency in law as well as in practice to distinguish in a civil strife three stages: (1) rebellion; (2) insurgency; (3) belligerency. As a rule it can be said that civil wars have their origin in a rebellion (upheaval) and mature to the state of insurgency. To the extent that third States or the parent State recognize the civil war, the insurgency acquires the stage of belligerency.

Rebellion: A domestic violence is called rebellion or upheaval so long as there is sufficient evidence that the police forces of the parent State will reduce the seditious party to respect the municipal legal order. International law has no place for rebellion.⁴² It follows that rebels

³⁹ Guggenheim, RdC 1952 p. 175: "C'est une erreur de croire que les guerres civiles ne relèvent pas en principe du droit international. Dès le moment du moins où un gouvernement local de fait s'opposant au gouvernement légal arrive à dominer effectivement une partie de la population, l'action militaire présente toutes les caractéristiques d'un conflit armé d'ordre international. On ne voit donc pas pourquoi les guerres civiles ne devraient pas être assimilées, quant à leur nature militaire, aux représailles armées ou aux mesures de sanctions déclanchées par une organisation internationale." La Pradelle: *La Conférence diplomatique et les nouvelles conventions de Genève*. 1951 p. 217 points also to the fact that in our times international war resembles in its turn civil war "dans la mesure où elle a pour enjeu le triomphe d'une idéologie et où elle prend par suite l'allure d'une révolution".

⁴⁰ See Lauterpacht 1947 pp. 184, 250 ff.; W. Friedmann: *International Law and the Present War*. Grotius Transactions 1940 p. 211; cf. Smith World Affairs 1955 p. 231/32.

⁴¹ J.O. 1937 pp. 10, 14.

⁴² *Ambrose Light Case* 25. F. 408 (1885).

have strictly no legal rights and foreign States are bound to respect the measures taken by the parent State for the suppression of the seditious party. These measures existed very often in that the parent State prohibited the importation of war material bound for the rebels or that it closed certain of its ports.⁴³ In principle foreign States are entitled to give material assistance to the parent State in its efforts to suppress the seditious party. On the other hand, any material support given by foreign States to the party in rebellion may give a case of intervention in domestic affairs and thereby constitute an illegitimate act under international law. Express confirmation of this principle was given in 1900 in the Resolution of the Institute of International Law.⁴⁵

Insurgency: While the term 'civil war' has no other legal signification than that of an antinomy to international war, its implications in the province of international law are specified by the notions of insurgency and belligerency. In a sense the term 'insurgency' may be regarded as the denomination of material war if the latter comes about by a civil strife. The distinction between insurgency and belligerency was already described in the case of *The Three Friends* as being tantamount to the difference between 'a war in the material sense' and 'a war in the legal sense'.⁴⁶ The said distinction received far earlier recognition in international practice than in international law but is now generally admitted.

Material war being determined by facts and by facts alone there is no such thing as an 'initiation of war' by the insurgents. The development from rebellion to insurgency depends upon contingencies which are beyond the pale of the seditious party, such as efficiency of the police forces of the parent State, the degree of assistance given by foreign States to the parent State, the willingness of the family of nations to abstain from any indirect support in favour of the rebels, etc. It follows that any declaration of war on the part of the seditious party is bare of any relevance in international law.⁴⁷

⁴³ See above p. 140 n. 33. If the state of affairs in 1885 in Colombia were really that of rebellion, Mr. Bayard would have been wrong in his letter of 25 March 1885 where he maintained "that the existence of a rebellion in Colombia does not authorize the public officials of the United States to obstruct ordinary commerce in arms between citizens of this country and the rebellious or other parts of the territory of the Republic of Colombia". Cf. Wilson AJIL 1907 p. 55.

⁴⁴ "The exercise of belligerent rights of search and capture by a band of adventurers clustered in some small island in the Greek Archipelago or in the Atlantic could subject them to the penalties of piracy." Lord Russell to Lord Lyons, 21 June 1861, *Fontes* No. 2465.

⁴⁵ *Annuaire* 1900 pp. 227 ff.; Lauterpacht 1947 p. 230.

⁴⁶ Cf. Wilson AJIL 1907 p. 49. See also Pflüger 1936 pp. 133, 187.

⁴⁷ "The insurgents or native communities, not being recognised states, have no power to convert a state of peace into a state of war. So their declaration or recognition of war would have no legal effect." Wright AJIL 1932 p. 366; cf. Rougier 1902 pp. 23/24; Liszt-Fleischmann 1925 p. 448 who invokes the declaration of war made in 1916 by the Greek commander Venizelos.

The recognition of insurgency by third States or by the parent State never is made *expressis verbis* but must be derived from the consideration which third States give to the existence of civil war in the material sense. The application of certain municipal regulations relative to neutrality may be a useful indication that the third State is willing to recognize the fact of material war but does not want to bind itself by the rights and duties of a neutral power under international law.⁴⁸ The *de facto* recognition by third States of certain belligerent acts of either of the contending parties constitutes a reliable indication that the civil strife is regarded as having turned into regular warfare. The same is true if the parent State, instead of opposing any intervention by the Red Cross as an unwarrantable interference in its internal affairs, is willing to collaborate with that institution for humanitarian ends.⁴⁹

It is the essential feature of the recognition of insurgency that it takes account of the existence of civil war in its municipal order without assuming any obligation under international law.⁵⁰ Recognition of a state of insurgency does not bring the law of neutrality into operation, that is, the recognizing State is not *bound* to apply it.⁵¹

The admission of insurgency by a third State being a domestic act, it can give no offence to the parent State, provided that the existence of material war is evident. This holds good particularly in the event that a third State regards ships of insurgents which are not recognized as belligerents, nevertheless as non-piratical. Their right to attack the parent State is generally derived from the fact of the existence of material war.⁵² Prior to the recognition of belligerency, if the parent

⁴⁸ Wilson AJIL 1907 p. 59. The neutrality laws of the United States forbid citizens to accept within its jurisdiction a commission or enlist others to serve foreign prince, state, colony, district, or people at war with a similar body, with which the United States is at peace. The courts have held that this applies to cases of insurrection as being war in a "material sense". Such a state of affairs was recognized by President Cleveland in 1896 with regard to Cuba.

⁴⁹ Cf. J.S. Pictet: *The International Committee of the Red Cross in the new Geneva Conventions*. Rev. I. Croix Rouge 1954 vol. VIII No. 8 Suppl. p. 168.

⁵⁰ In the *Ambrose Light* case it was said that insurgents have no legal rights "as against other nations until recognition of belligerent rights is accorded to them" (*italics added*).

⁵¹ A.D. McNair: *Legal Effects on War*. 1944 p. 11, observes that it is doubtful whether, as between Great Britain and the insurgents, recognition of insurgency does more "than indicate that, so long as they confine their acts of violence to the parent Government against which they have risen, they will not be treated as pirates".

⁵² To an opposite effect: *The Ambrose Light* case, 25 Fed. 408 (1885). The *Ambrose Light*, a vessel belonging to the insurgent party in resistance to the Government of Colombia, had instruction to attack Colombian ships and to engage in hostilities against the parent State, but no other depredations were intended. The ship was captured by an American gunboat in the Caribbean Sea and condemned by the court on behalf of its piratical character. Chen 1951 p. 334 observes that this was perhaps the only judicial authority in full support of the so-called concession theory. Cf. Wehberg 1938 pp. 184, 185; Lauterpacht 1947 pp. 295 ff., AJIL 1938 p. 28.

State does not recognize the existence of war, third States are nevertheless free in their relations with and conduct toward the parties to give effect to the existence of a material war.⁵³

During the Spanish Civil War of 1936-39 the principal European powers gave an illustration of what the limitations are meant to be which are set by the recognition of insurgency. The contending parties to the Spanish Civil War were expressly refused to exercise any belligerent rights against foreign ships on the high seas and the export of war material to either side was prohibited by an international convention.⁵⁴

Belligerency: The difference between the status of belligerency and that of insurgency is determined by the relation of the contending parties to foreign States; while the recognition of belligerency gives rise to definite rights and obligations under international law, insurgency does not.

Civil war, imperial war, and international war, if recognized as such, imply that both sides are to be treated as equals by other states designated neutrals. Both are entitled to the rights and powers of belligerents as long as the war lasts. In civil war and often in imperial war the revolt is in violation of the municipal constitution and laws of the state, and if the legal government is successful, it may, of course, apply its own law to punish treason after hostilities are over.⁵⁵

⁵³ On the occasion of the revolt of St. Domingo against Spain in 1864 the British government persisted in refusing to recognize belligerency. In their opinion of 22 August 1864 the Law Officers declared that 'if the facts are such, as really to constitute a state of war, between the contending parties, according to the law of nations, it is not, we think, competent by law, to any neutral power, to withdraw its ships and subjects upon the high seas, from the operation of the ordinary laws incident to that state of things, merely by declining to acknowledge its existence'. See Chen pp. 341 and 354.

"In 1895 when France went to war to maintain the Protectorate over Madagascar, Great Britain considered issuing a declaration of neutrality. The French ambassador protested that such a course would be unusual. Great Britain refrained from issuing the declaration, apparently considering the revolted protectorate in the same category with a revolting colony or other dependency. The French, however, observed the laws of war in their treatment of the insurgents." Wilson AJIL 1907 pp. 51/52.

⁵⁴ The political reason of that policy was to compel the parties "to fight out their quarrel within the land frontiers of Spain". Smith 1948 p. 71. Cf. Friedmann Grotius Transactions 1940 pp. 211 ff.

Juridically it is arguable that the aid furnished by Germany, Italy and Portugal to the Franco government was an illegitimate act vis-à-vis the Spanish government. Cf. J. Garner: *Questions of International Law in the Spanish Civil War*. AJIL 1937 p. 67; Scelle FW 1937 pp. 65 ff.; Weber 1940 pp. 188 ff.

⁵⁵ Wright 1942 p. 695. Cf. Antokolez 1944/III p. 649 who speaks in the event of a recognized belligerency of an "international civil war": "Entonces, unicamente con respecto a los pises que hicieron el reconocimiento, la lucha civil se considera como si fuese una guerra internacional." Wehberg 1953 p. 74; Fenwick 1948 p. 546; Lauterpacht 1947 p. 270.

Although recognition of belligerency *expressis verbis* has been exceptional, third States, if urged by political, commercial, geographical or other reasons, generally do not refrain from recognizing in some way the status of belligerency in a civil war.⁵⁶ The recognition of a belligerent blockade established by either party is *prima facie* tantamount to a recognition of belligerency.⁵⁷

As a consequence, the recognizing State engages itself to assume all the obligations flowing from the existence of a formal war, and its courts are bound to take notice of that state of affairs. The insurgent party becomes for the purposes of its belligerency a subject of international law but only with regard to the recognizing States. The recognition of belligerency does not go beyond a *de facto* recognition of the insurgents as a belligerent power. The implications of that recognition are determined by the law of war which is applicable in a formal war.

Paragraph 3. The existence of material war makes compulsory the application of those laws of war which are derived from principles of humanity and military necessity.

I. The existence of material war automatically entails the application of the laws of warfare.

Since the last century State practice became accustomed to apply certain rules of warfare in armed conflicts which were said to be *de facto* war but not "war in the sense of international law". The benevolent application of certain laws of war in a *de facto* war attributed on the one hand a great deal to the customary recognition of material war in the province of international law.⁵⁸ On the other hand,

⁵⁶ The American Civil War is regarded as a precedent to the rule that if the parent state recognizes the belligerency of the insurgent party either directly or indirectly by establishing a blockade or by exercising other belligerent rights, the parent State cannot object to the recognition of belligerency on the part of third States. See *Annuaire* 1900 p. 228; Rolin 1920/1 pp 204/05; Harvard Draft Convention AJIL 1939, Suppl. p. 209.

In *U.S. v. Greathouse* 4 Sawyer 457 (1863) the court assumed that recognition of belligerency of the South by the United States protected individuals 'levying war' against the United States from prosecution for treason only in respect to acts in the area of rebellion, during the period of rebellion, and within the scope of belligerent rights. See Wright AJIL 1953 p. 365. There is a trend in legal doctrine to plead for an obligation of third States to accept the status of a neutral after the parent State has recognized the belligerency of its insurgents. Cf. Lauterpacht 1947 p. 200. The rule is that third States are not concluded by such recognition of the parent State. Cf. Rougier 1902 pp. 381 ff.

⁵⁷ Cf. Woolsey AJIL 1950 p. 354.

⁵⁸ The voluntary application of the rules of warfare in *de facto* wars could not be interpreted as any kind of recognition if the other party to the conflict did not have the legal status of a State. It is with this in mind that Lieber's Code distinguished the applicability of the rules of warfare in international law and in civil war: "When humanity induces the adoption of the rules of regular war toward rebels, whether the adoption is partial or entire,

there was general agreement that a recognition of material war in the province of international law would make sense only if it entailed the compulsory application of all those rules of war in a material war which have been established for humanitarian reasons.

Although the time-honoured conventions dealing with the conduct of hostilities generally concern only wars in the formal sense, it can now be regarded as an established rule that the customary usages relative to military operations as well as to naval and aerial operations must be applied to ... what may be called 'war in the material sense as conceived by international law'.⁵⁹

II. *The relevance of material war before courts.*

There are ample precedents in Anglo-Saxon common law and there is sufficient support in the court practice of the major continental States to show that if courts are not bound to the contrary by authoritative statements of their government, they do not refrain from recognizing material war as being war for the purpose of law. In general, courts regard themselves to be entitled to do so just because of the fact that a certain amount of national laws dealing with war envisages either expressly or by their implication the event of material war.⁶⁰ It may be said that the statement which the American court made recently in *U.S. v. Bortlik* with regard to the meaning of war in law has become of general value because it implies both material war and formal war:

it does in no way whatever, apply a partial or complete acknowledgment of their government ... Nor does the adoption of the rules of war toward rebels imply an engagement with them extending beyond the limits of these rules ... Treating, in the field, the rebellious enemy according to the law and usages of war has never prevented a legitimate government from trying the leaders of the rebellion or chief rebels for high treason ..." Quoted from Wright *AJIL* 1953 p. 365.

⁵⁹ Guggenheim *RdC* 1952/I p. 175 (translation), who observes that this evolution has not only been supported by principles of humanitarian or military usages but is confirmed in recent conventions. Cf. Wehberg *FW* 1938. La Pradelle 1951 p. 56 declares that "toute société de guerre, dès l'instant qu'elle existe en fait, doit être aussitôt saisie par le droit". See Lauterpacht *BYB* 1953 p. 213. Stone 1954 p. 313 draws the following conclusion: "It seems clear that as between the belligerents, and for the purposes of the rules as to permissible combatants, objects of attack and modes and means of violence, hostilities on a large scale have usually been regarded, even by the parties, as legally war." The Diplomatic Conference to the Geneva Conventions agreed in its third preparatory Commission that "the conventions and agreements in force juridically define the state of war but that this definition does not always correspond to some situations which have existed during recent years and which in fact corresponded to a state of war" (translation). To a similar effect Hyde, *International Law* III p. 1688; H. Taubenfeld: *International Armed Forces and the Rules of War*. *AJIL* 1951 p. 674: Bassompierre *RDILC* 1923 p. 244 rightly said: "Vouloir, sous prétexte de non-belligérance, se libérer soi-même des devoirs de celui qui fait la guerre tout en imposant à son adversaire, serait en pratique irréalisable."

⁶⁰ Cf. Eagleton 1933 p. 283; Wilson *AJIL* 1932 p. 328.

War, as the term is commonly used, is a conflict by force between two or more nations, it is a conflict of violence by one politically organized body seeking to overcome or overthrow another political entity. It is patent that Congress was legislating in regard to this type of struggle.⁶¹

With regard to the laws of warfare, not all of them can be applied to material war. This, for instance, is the case for most of the rules relative to economic warfare.⁶² Do the laws of *occupatio bellica* apply in a material war? Should, for instance, the territories of Northern Greece which were occupied by the Bulgarian troops from 1941 until 1944 without any formal declaration of war be considered by the Greek courts as falling within the regime of occupation for reason of a material war?⁶³

The laws of occupation are predominantly 'emergency law' which do not legally suppress the right of sovereignty. In this manner the occupation only confers limited rights on the occupying power and the sovereign authority of the occupied nation does not disappear but is temporarily in suspense so long as the military occupation continues.⁶⁴ It appears that the laws of occupation may be applied by courts to material wars to the extent that they purport to regulate a temporary *de facto* situation.⁶⁵

Besides the admission of material war in national court practice, the same has become true in the practice of recent international courts. The Tokyo Tribunal called the Russo-Japanese border conflict from 1937 to 1939 war.⁶⁶ The International Military Tribunal in Nuremberg, in examining the legal position of Italian troops who resisted German demands for surrender, based its judgement on the assumption that material war had its relevancy in international law. In discussing the position of the Italian officers who were executed by German military forces after having resisted by armed force the German demands at Split, the Court hinted at the fact that the military fighting between the Italian forces and the German army of General Rendulic was sufficient in order to confer upon the Italian officers, after their capture, the status of prisoners of war.⁶⁷

It is the contention of the defendant Rendulic that the surrender of the Ninth Italian Army, commanded by General D'Almazzo, brought

⁶¹ 122 F. Suppl. 225 (Middle D. Pa., July 28, 1954) reported in AJIL 1955 p. 103. The judgment dealt with a Jehovah's Witness entitled to Selective Service classification as a conscientious objector despite the fact that he was not opposed to participation in "theocratic warfare".

⁶² Cf. Guggenheim RdC 1952/I pp. 175/76.

⁶³ Cf. G. Tenekides: *Occupatio bellica in the recent Greek jurisprudence*. Clunet 1953 pp. 822 ff.; 1954 pp. 636 ff.

⁶⁴ Tenekides Clunet 1953 p. 837.

⁶⁵ The Tribunal Civil of Rhodope defined occupation for reasons of war as a "temporary *de facto* situation", in the judgment No. 11 of 1947. Quoted from Tenekides Clunet 1953 p. 837; see *ibid.* the numerous references to definitions of occupation by Greek tribunals.

⁶⁶ Cf. Pompe 1953 p. 28.

⁶⁷ War Crime Reports, vol. VIII pp. 44/45.

ipso facto the surrender of the Bergamo Division in Split and that elements of this division by continuing to resist the German troops became franc tireurs and thereby subject to the death penalty upon capture.

It must be observed that Italy was not at war with Germany, at least in so far as the Italian commanders were informed, and that the Germans were the aggressors in seeking the disarmament and surrender of the Italian forces. The Italian forces which continued to resist met all the requirements of the Hague Regulations as to belligerent status. They were not franc tireurs in any sense of the word. ...

The coercion employed in securing surrender, the unsettled status of the Italians after their unconditional surrender to the Allied forces and the lack of a declaration of war by Germany upon Italy creates grave doubts whether the members of the Bergamo Division became prisoners of war by virtue of the surrender negotiated by General d'Almazzo.⁶⁸

III. *The significance of the Geneva Conventions of 1949 with regard to material war.*⁶⁹

The increasing tendency since World War I to subject to the humanitarian rules of war all forms of material war⁷⁰ has found its positive expression in the four Geneva Conventions of 1949. Article 2, paragraph 1 of the revised Prisoners of War Convention⁷¹ declares:

In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war

⁶⁸ Ibid. pp. 71/72. The evidence showed that on 3 September 1943 Italy surrendered unconditionally to the Allies. The surrender was announced publicly on 8 September 1943. The defendant testified that this event was anticipated by him as well as the possibility that Italy would become an enemy of the Germans. His testimony was to the effect that the German Army, in performing its task of guarding the coast to prevent an Allied landing, could not tolerate the presence of hostile Italians in these coastal areas. Holding these definite views of the necessity of the situation, the defendant set about removing the Italians from the coastal areas by making them prisoners of war. He forced General D'Almazzo, Commander of the Italian Ninth Army, to sign an armistice with him.

⁶⁹ Cf. J.A. Gutteridge: *The Geneva Conventions*. BYB 1949 pp. 294 ff. J.S. Pictet: *Les nouvelles conventions de Genève et la Croix Rouge*. Rev. I. Croix Rouge 1949 pp. 655 ff.; Frederic Siordet: *Les Conventions de Genève et la guerre civile*. Rev. I. Croix Rouge 1950 pp. 104 ff.; H. Strebel: *Das Genfer Abkommen vom 12. August 1949. Fragen des Anwendungsbereichs*. ZaöRuV 1950 p. 123.

A. de La Pradelle: *La Conférence diplomatique et les nouvelles conventions de Genève*. 1951 pp. 210 ff.; Lauterpacht BYB 1953 p. 213.

⁷⁰ In the material war in Upper Silesia the two contending parties formally agreed to abide by all of the rules contained in the Geneva Convention. Cf. La Pradelle 1951 p. 210.

⁷¹ Geneva Convention for the Amelioration of the Condition of the wounded and sick in armed forces in the Field, Geneva 12 August 1949.

or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.⁷²

In addition, Article 3 of all four Conventions makes it clear that "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties", each party to the conflict shall be bound to apply a minimum of rules which are laid down by the Convention. To that extent the Convention confirmed that the parties to a civil war must respect certain laws of war.⁷³

⁷² In addition, this Article provides in its par. 3: "Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power if the latter accepts and applies the provisions thereof." Cf. Stone p. 654 who regards this paragraph as reflecting the 'legislative' character of the Convention (n. 13); Guggenheim RdC 1952/I p. 175. Gutteridge BYB 1949 p. 298 observes with regard to Article 2:

"There have, however, been circumstances in recent times in which opposing states have engaged in armed conflict on a large scale and have simultaneously disclaimed a decision to bring into being a state of war. It is in order to secure the application of the Convention in such circumstances that those who drew up the Geneva Convention added to the first paragraph of Article 2 the words "even if the state of war is not recognized by one of them".

⁷³ It can easily be seen from the preparatory works of the Geneva Convention that the phrase "armed conflict not of an international character" does not imply a preliminary recognition of belligerency. In the event of a civil war, this phrase covers therefore the meaning of 'insurgency' as has been defined above at pp. 231 ff. cf. La Pradelle 1951 p. 213.

H. Brandweiner: *Sind die Vereinten Nationen den Kriegsgesetzen unterworfen?* Neue Justiz 1954 pp. 225/26 does not admit that the principles in Articles 2 and 3 of Geneva Convention of 1949 have become rules of general international law: "... denn die Genfer Konventionen sind nicht von allen Staaten der Welt abgeschlossen worden und die oben erwähnten Grundsätze sind noch zu neu, als dass man bereits Feststellungen darüber treffen könnte, ob sich eine entsprechende allgemeine Staatenpraxis gebildet hat. To an opposite effect: Taubenfeld AJIL 1951 p. 671. Brown Rev. I. Croix Rouge 1934 pp. 457 ff. declared: "La guerre, dans le sens des Conventions auxquelles nous venons de faire allusion, est avant tout une situation de fait non pas un état légal."

The revised Prisoners of War Convention of 1949 was adopted with strong insistence of Soviet Russia; the submission of material wars to certain rules of warfare corresponded to a pressing problem of the U.S.S.R. which had become evident in World War II when its resistance troops were fighting in occupied territory. With regard to this and similar situations she wished to secure the status of prisoners of war for their subjects. Hence there is much hope that the principles laid down in the revised Prisoners of War Convention of 1949 will retain their efficacy.

La Pradelle 1951 p. 217 holds in this regard: "La reconnaissance par la Conférence diplomatique de Genève du principe même de l'application des Conventions à la guerre civile, loin de réaliser, aux dires de certains délégués, une immixtion inadmissible dans la compétence exclusive des Etats, n'a fait que préciser, dans un domaine que, de l'avis de tous les internationalistes, relevait déjà du droit international coutumier, le caractère de nécessité sociale et morale des règles protectrices de la vie humaine."

The Convention, in keeping with other developments in modern international law, treats persons and entities other than States as subjects of international rights and duties.⁷⁴

Paragraph 4. Material war is supposed to be terminated by an armistice agreement.

While a formal state of war cannot be abrogated by the conclusion of an armistice agreement,⁷⁵ the latter is nevertheless conclusive for the termination of material war if it extends to the entirety of military operations. Owing to the fact that the settlement of military conflicts under the Charter of the United Nations is conceived as dealing with material wars only, the settlement of military conflicts has been tried to be achieved only by means of armistice agreements. It goes without saying that an armistice recommended by the UN to the belligerent parties is not only an agreement to end active hostilities but will generally contain a number of political provisions indispensable for the effective restoration of peace.⁷⁶

In the Israelo-Arab conflict in Palestine the Security Council, in its Resolution of 16 November 1948, urged the contending parties to agree

⁷⁴ Lauterpacht BYB 1953 p. 213: "For that reason it follows from a proper interpretation of the Convention that while the detaining State is entitled to put on trial prisoners of war accused of war crimes and other crimes committed prior to captivity, the utmost restraint must be exercised in respect to punishment after prolonged hostilities, for what is in essence a political crime of treason and rebellion."

⁷⁵ Cf. G. Kaeckenbeck: *De la guerre à la paix*. 1940 pp. 30 ff. who takes into consideration only armistice agreements concluded in the course of a formal war. For a juridico-political study of the 'timing and setting of peace-making' with regard to formal wars see D. Thomson-Meyer-Briggs: *Patterns of Peacemaking*. 1945 pp. 42 ff.

In *Re Orchard* (1948) 1 All E.L.R. 203 England, Chancery Division, reported in AJIL 1948 pp. 950/51, the court declared with regard to the provision of a will: "in the event of an armistice having been concluded between Great Britain and Germany in the present war" that there had been such an 'armistice' in the unconditional surrender of Germany.

⁷⁶ The Renville Truce Agreement in the Indonesian war of Independence contained military, political and economical elements. S. Rosenne: *Israel's Armistice Agreement with the Arab States*. 1951 pp. 27/28 considers the armistice of formal and material wars on the same level. He finds the genesis of the modern aspect of armistices since 1945 "in the view which became widely held during the difficult years which preceded the outbreak of the Second World War, that it would have been more wise had the armistice of 1918 not been followed so quickly by the peace treaty, and that after serious hostilities a considerable period should elapse for 'cooling-off' before a peace treaty should be negotiated, and thus bring the state of war to an end".

This juridico-political explanation does not hit the crux of the problem. The essential thing is that armistice agreements at the end of material wars are expected to close the war and therefore may include political, economic or even social provisions. Armistices in formal wars, however, do not terminate the state of war but only provide the preliminaries for the conclu-

upon the tracing of a permanent armistice demarcation line and to withdraw and reduce their armed forces. Moreover, "in order to eliminate the threat to the peace in Palestine and to facilitate the transition from the present truce to permanent peace in Palestine" the preamble to this Resolution implied that the agreements should be of the widest possible character to include the minimal transitional provisions not of a purely military character necessary to bring about permanent peace in Palestine.⁷⁷ Even in the Korean war, whose character was not beyond doubt in the nature of a true material war, the United Nations proceeded by means of an armistice agreement for the settlement of that conflict.

Whereas the armistice agreement in a formal war continues to remain a matter for the belligerents alone, in which the outside world does not interfere, the legal instrument of armistice under the rule of the United Nations for the termination of material wars does not exclude the interference of the United Nations.⁷⁸

sion of a peace treaty. Hague Convention IV deals only with armistice agreements in a formal war. While its provisions with regard to truce and local armistice agreements are no doubt compulsory in a material war, other provisions with regard to the complete armistice can be applied only by way of analogy. F.R. Monaco: *Les Conventions entre belligérents*. RdC 1949/II pp. 215 ff. et p. 335 "Etant donné cette forme nouvelle prise désormais par les armistices, on pourrait se demander si les clauses qui ne se réfèrent pas directement aux opérations de guerre ont la même validité des dispositions propres de l'armistice."

⁷⁷ Rosenne 1951 p. 27. "In the event, the Armistice Agreements actually contain several provisions for which no express call was made by the Security Council. These include one stipulation of a far-reaching political character, an apparent non-aggression pact which appears in each of the Agreements; one provision of a purely military character, that relating to the release and repatriation of prisoners of war; and two general provisions of a technical nature, those relating to the supervision of the implementation of the Armistice Agreements, and those relating to the introduction of modification into their terms." (p. 28)

Owing to the function of the armistice in a material war which is to restore peaceful relations between the belligerents, it is not surprising that armistice agreements in material wars may have a striking similarity with the 'preliminaries of peace' of former times. Cf. R. Bernand: *L'armistice dans les guerres internationales*. 1947 pp. 19 ff. at p. 24.

⁷⁸ See Rosenne 1951 p. 28: "The distinguishing feature of our Agreements is not, as is sometimes thought, that the hostilities had ended indecisively before the opening of the negotiations — a fact which was to render the negotiations themselves extremely delicate — but the fact that the negotiations were undertaken pursuant to an invitation backed by a threat from an outside body, the Security Council, and under the continuous supervision and active intervention of the Secretariat."

Yet the practice of terminating a material war by the imposition of an armistice from the outside world finds its precedences since the era of the Concert of Europe. In the Greek War of Independence, for instance, Britain, France, and Russia endeavoured to close that war by the imposition of an Armistice provided in the secret article to their Treaty of 6 July 1827.

SECTION 2. THE CONCEPT OF WAR IN THE FORMAL AND MATERIAL SENSES
CONSERVES THE DICHOTOMY OF PEACE AND WAR IN CONTEMPORARY
INTERNATIONAL LAW.

Paragraph 1. Modern international law remains conservative with regard to peace and war.

The problem of war and of the law relating to it essentially concerns legal technicalities.⁷⁹ This is true whether international law deals in particular with the outlawry of war, with the application of the laws of war or with judicial decisions on the question 'War or No War'. In any of these events legal thinking would degenerate into political arbitrariness without "the confining walls of the firmly established distinction between war and peace, a dichotomy which was well rooted before Grotius subsumed all of international law under the heading *De Jure Belli ac Pacis*".⁸⁰

The whole trend of civilized customs is to mark war off clearly as something special and exceptional ... The more clearly the state of war is marked off from the state of peace the less danger there is of our carrying over the habits and standards of conduct from one to the other. The institutionalization of war is the greatest security against this danger.⁸¹

For the purpose of the institutionalization of war in the province of international law it does not matter that between the polar extremes of 'No Coercion' and the highest degree of coercion there is "not one stage of intermediacy but countless stages".⁸² Actual warfare can take place without formal war and a state of war can exist without actual warfare.⁸³

In legal doctrine various attempts have been made to replace the legal premise *inter pacem et bellum nihil est medium* by admitting besides the state of war and the state of peace a third state which is sometimes called 'status mixtus' or 'intermediacy'.⁸⁴ The admission of such a

⁷⁹ P.C. Jessup: *Intermediacy*. Acta Scandinavica 1953 p. 23.

⁸⁰ P.C. Jessup: *Should International Law Recognize an Intermediate Status between Peace and War?* AJIL 1954 p. 98.

⁸¹ G.C. Field: *Principles and Ideals in Politics*. Hobhouse Memorial Trust Lecture 1948 pp. 23/24, quoted from G. Williams: *The Defense of Necessity*. CLP 1953 p. 226 n. 51.

⁸² Cf. McDougal: *Peace and War, Factual continuum with multiple legal consequences*. AJIL 1955 p. 67 who, holding an opposite view, marvels at the restraint of Stone's proposal according to which the question 'War or No War' may be answered differently.

⁸³ Cf. Wright AJIL 1932 p. 363; Wilson AJIL 1932 p. 327; Stödter 1948 p. 113.

⁸⁴ Rumpf ArchivVR 1950 p. 44 substitutes the alternative of peace and war by institutionalizing the sociological concept of hostility: "Wie will man denn soziologisch solche internationale Vorgänge einordnen wie Boycott, Verschleppung von Menschen anderer Völker zur Sklavenarbeit, Ausweisung und Enteignung von Millionen Menschen anderer Nationalität... die russische Blockade von Berlin? Gehören diese Handlungen zum Tatbestand Krieg

status mixtus in practice was deduced from the fact that acts of armed force, if done *sine animo belligerendi*, are not compatible with a state of peace. Moreover, it is maintained that

If States had desired to create a clear borderline between peace and war, they could have achieved this object only at the price of renouncing their claim to the use of force in time of 'peace'. Then war and the use of armed force would have become identical, and a clearly discernible criterion of war would have become available.⁸⁵

There is little doubt that the Anglo-Saxon doctrine of 'measures short of war' had been one of the antecedents of the trend to establish a third state besides that of peace and war.⁸⁶ Yet all attempts to establish a legal state of 'intermediacy' between that of peace and war did not exceed the bounds of doctrinal controversy. The indictment of Lord Macnaughten lost nothing of its fundamental validity when he said:

The Law recognizes a state of peace and a state of war, but ... it knows nothing of an intermediate state which is neither the one thing nor the other, neither peace nor war.⁸⁷

International law, in recognizing the relevance of material war, chose to solve the problem of 'War without declaration of War' in favour of the classic dichotomy of *inter pacem et bellum nihil est medium*. What has changed, however, with regard to the dichotomy of peace and war

oder Frieden? Es gibt nur einen Begriff, der diese Vorgänge deckt und der auch im Völkerrecht gebräuchlich ist, der Begriff der Feindseligkeit, hostility."

Smith World Affairs 1955 p. 232 reasonably declares that what we have come to call the 'cold war' is "really a state of nervous tension in which everybody fears that war in its most terrible form may break out the next day".

⁸⁵ Scharzenberger AJIL 1943 pp. 474/75 and Manual 1950 p. 77. Cf. Jessup Acta Scandinavica 1953 pp. 10 ff.; L.M. Quintana: *El tercer estado del derecho internacional*. Völkerrecht und Völkerpflicht 1954 pp. 35 ff. Stone 1954 p. 646.

While Schwarzenberger affirms the accomplished breakdown of the State-of-war doctrine over the "reality of the *status mixtus*", Jessup and Stone merely hold the view that some new legal regime intermediate between peace and war might be useful to avoid certain grave injustices resulting from the present dichotomy between peace and war. "While in part the shift of the armistice agreement into the place of the peace treaty mitigates the evils, it does so only within the limits of its use. Beyond that the relations of individuals and States must still be stretched for years on the legal rack of a state of war which does not correspond to any present reality." Stone 1954 p. 646.

⁸⁶ Cf. F. Wharton: *A Digest of the International Law of the United States*. 1887/III p. 230; E.T. Holland: *War sub modo*. LQR 1903 pp. 133 ff. For a general survey on that doctrine see Keller 1934 p. 16.

⁸⁷ *Jenson v. Driefontein Consolidated Mines* (1902) A.C. 497 quoted from McNair 1944 p. 5. C. Schmitt: *Die Wendung zum diskriminierenden Kriegsbegriff*. 1938 p. 48 takes account of the fact that "die ... logische Dignität des Kriegsbegriffes ist so stark und ausschlaggebend, dass von ihr stets ein einfaches Dilemma, Krieg oder Nicht-Krieg ausgeht ... Was nicht 'Krieg' ist, ist dann eben 'Frieden'." See also Ronan AJIL 1937 p. 643.

is that it no longer implies, in the event of war, the integral application of the sum-total of the laws of war. It has become customary to apply them in part or entirely according to whether a formal or a material war is dealt with.

Paragraph 2. The concept of war in the material and formal senses with regard to the maxim: "Inter pacem et bellum nihil est medium".

The statement of Cicero: *Inter pacem et bellum nihil est medium* which had been taken up by Grotius in his *De Jure Belli ac Pacis* had been very much of a legal dogma so long as the Grotian view of war as a state was exclusive in international law.⁸⁸ After the recognition of material war as a legal status in addition to the state-of-war theory the following implications flow from the principle of *inter pacem et bellum nihil est medium*:

(a) Peace and formal war. The essence of formal war consists in that it is dependent upon the *animus belligerendi* of at least one of the parties to the conflict and that, as a legal consequence, it produces its effects not only *inter partes* but also with regard to third powers. The contingencies of any such formal war have been condensed by McNair⁸⁹ under three headings. A state of war is held to arise in international law

- (1) at the moment, if any, specified in a declaration of war or
- (2) if none is specified, then immediately upon the communication of a declaration of war or
- (3) upon the commission of an act of force, under the authority of a State, which is done *animus belligerendi*, or which, being done *sine animus belligerendi* but by way of reprisals or intervention, the other State elects to regard as creating a state of war.⁹⁰

(b) Peace and material war. A government will be engaged in war upon committing acts of military force which are repelled by force and

⁸⁸ Cf. Kunz 1935 p. 8; C. Schmitt: *Inter pacem et bellum nihil est medium*. ZADR 1939 p. 595; Ronan AJIL 1937 p. 643.

⁸⁹ McNair. *The legal meaning of war*. Grotius Transactions 1925, Reprint p. 17. Whether the fact of organized hostilities is merely indicative of the intention of the parties, Anglo-Saxon courts have generally found that the state of war begins with such acts.

⁹⁰ In this event the election may have retroactive effect upon the commission of the first act of force. Cf. Hall-Higgins 1924 p. 434; Hoijer 1930 p. 282 and the critics of Keller 1934 p. 33.

When the American ambassador in Tokyo left Togo's department at 00.30 in the morning of 8 December 1941, the Tokyo Military Tribunal concluded that "the two countries were at war as the Japanese Naval Operation Order fixed 00.00 hours of the 8th December (Tokyo time) as the time at which 'a state of war' shall exist." Yet the attack on Kota Baru only followed at 1.25 hours, that on Pearl Harbour two hours later, and the following day only did the Japanese Privy Council begin to deliberate on a declaration of war against America. Pompe rightly stresses "that the Tribunal was conscious of the difference between a Japanese military 'state of war' and a international one, is evident from the mention of the threat to Dutch territory and from the addition of the words 'in self-defence'." Pompe 1953 pp. 32/33. Cf. E. Borchard: *When did War begin?* AJIL 1947 pp. 621 ff.

the armed contest qualifies itself as war in the material sense by the presence of the following facts: (1) organized governments as parties to the conflict; (2) capacity for conducting the military operations in conformity with the rules of warfare; (3) a sufficient lapse of time to give evidence of the dual character of the hostilities.⁹¹ Peace will be supplanted by material war no matter whether the contending parties refuse to regard the armed conflict as war provided they continue to engage in armed hostilities against one another.⁹²

It follows that acts of armed force which are neither launched with *animus belligerendi* nor resisted, and which the latter does not choose to consider as acts initiating war, do not bring about war under international law.⁹³ On the other hand, any clash of arms which has the characteristics of material war is self-explanatory to that effect even in the event that the contending parties deny its warlike character.

Paragraph 3. The meaning of the war-time clause in treaties and conventions.

There exists an amount of customary and written laws which are dependent upon the war-time clause. So, for instance, after World War I the Commission of Jurists at the Hague in 1923 set up a draft which was entitled 'Rules for the Control of Radio in Time of War'.⁹⁴ Similarly, the Geneva Convention of 1949 relative to the Protection of Civilian Persons was provided for in 'time of war'. The war-time clause has not been specifically defined in any of these and similar conventions. In practice, however, it has been admitted that any such clause may refer either to material or formal war or to both.⁹⁵ Courts have become accustomed to derive the exact reference to either of these concepts from the context of any such war-time clause.

⁹¹ In the *Almeria case* which occurred in 1937 in connexion with the Spanish Civil War, the German man-of-war *Deutschland* had been air-bombed by planes of Republican Spain whereupon Germany reacted by shelling forts of the Spanish town Almeria. The action was carried through on 29 May 1937 by a part of the German Navy staying in Spanish territorial waters. The fire was returned by the forts of Almeria and both sides had casualties. The element of *animus belligerendi* being absent on both sides, the conflict could not develop even into a material war because of the lack of the time element.

⁹² Cf. Nys 1912/II p. 587; de la Brière RdC 1928/II p. 274; Sfériades RDILC 1936 p. 143; Rolin 1920/I p. 112; Politis RGDIP 1924 p. 12; Tenekides RDILC 1926 p. 411. To an opposite effect Eagleton 1941 p. 324, Hold-Ferneck 1932/II p. 240.

⁹³ "However critically be the state of affairs, however imminent war may be, if and so long as the Government of the State abstains from declaring war or making war or accepting a hostile challenge there is peace — peace with all attendant consequences — for all its subjects." McNair 1944 p. 5.

⁹⁴ AJIL 1923 Suppl. pp. 242 ff.

⁹⁵ The report of the Red Cross of 1947 relative to the revision of Hague Convention X presumably considers in its Art. 25 the event of a formal war. This article says: "Les dispositions de la présente Convention seront respectées par les Hautes Parties contractantes en toutes circonstances.

Au cas, où, en temps de guerre un belligérant ne serait pas partie à la

The war-time clause may be determined even if only in a negative way, for instance in air law where the right of passage is recognized only in time of peace.⁹⁶ The notion of 'peace' has lost very much of its controversial character since international law became accustomed to specify war in either of its legal alternatives, i.e., material or formal. A State, however, which invokes the relevance of a peace-time clause in a material war will certainly have the burden of proof of any such interpretation.⁹⁷

SECTION 3. LEGAL ISSUES WITH REGARD TO FORMAL WAR.

Paragraph 1. The "legalistic" aspect of formal war.

I. War short of hostilities.

According to the logic of formal war it is possible to bring about a state of war without resorting to armed force. In consequence, it has been conceived in international law that war is liable to be "waged" by nothing more than a declaration of war. Any such legalistic form of warfare, which admittedly is a form of anomaly to warfare in the ordinary sense, has given rise to numerous criticisms which *grosso modo* question the compatibility of such 'hypothetical' states of war with the rules of an effective state of war.⁹⁸

Convention, ces dispositions demeureront néanmoins obligatoires entre tous les belligérants qui y participent."

The rules for the control of radio in time of war are provided for in the event of both material and formal wars. Article 1 of the above-mentioned draft stipulated: "In time of war the working of radio stations shall continue to be organized, as far as possible, in such a manner as not to disturb the services of other radio stations. This provision does not apply as between the radio stations of opposing belligerents." See also Articles 9, 10 and 12 of that Convention.

The Convention Relative to the Protection of Civilian Persons in Time of War ceases to apply in the territory of the contending parties at the end of material war. Yet certain provisions of this Convention equally apply after the end of material war provided that the latter has been followed by a regime of military occupation. Cf. Castrén 1954 p. 63.

⁹⁶ Cf. Riese-Lacour: *Précis de droit aérien*. 1951 p. 71 who remarks in this regard: "Une discrimination doit être faite selon l'ampleur des hostilités. En effet, une guerre entre deux Etats sud-américains ne suspendra pas l'application de la convention en Europe. Par contre, l'état de guerre plus ou moins généralisé peut entraîner la cessation de son application. Cependant, faute d'une telle précision dans le texte même de la convention — précision qui fait également défaut dans la convention de Chicago — ceci est douteux. L'article 38 de la Convention de Paris (Art. 89 Chicago) rend du reste aux Etats contractants, pour le cas d'une guerre quelconque, toute leur liberté d'action." (Italics added).

⁹⁷ The proof is facilitated in the event that a war-time clause takes account even of "a proclamation of national emergency through the instrumentality of municipal law. This might apply, for instance, to the International Air Service Transit Agreement of 1944." Lauterpacht BYB 1953 p. 222.

⁹⁸ P. Fauchille: *Traité de Droit International*. 1921/II p. 650 interpreted any such state of affairs as 'de facto neutrality' which he claimed to derive from practice during the first World War. That author observed with regard

In State practice, however, no formal protest has ever been made against the indiscriminate treatment of parties to war alliances which contributed nothing more than a declaration of war to the war efforts. During the first World War a great many Latin-American States followed the lead of the United States in 1917, in declaring war upon Germany. They adopted a number of municipal measures in harmony with their declaration of war such as supervision of enemy aliens and control of their property. It was generally recognized that these States did not break any rule of international law in taking these municipal measures while at the same time refraining from any substantial contribution to the war efforts of the Allied forces, not to speak of engaging in military operations. This category of States, which up to 1917 had been neutral to World War I, by their declaration of war upon Germany and Austria freed themselves, no doubt, from all the duties and forfeited all the rights of a neutral State.⁹⁹

Yet there remained a second category of States which, being in sympathy with the war aims of the United States, undertook to cooperate with them without declaring war upon their enemy. So the Governments of Costa Rica and Guatemala informed the United States that they would be glad to offer the hospitality of their ports and waters to the naval vessels of the United States.¹⁰⁰ The Government of El Salvador made a similar offer declaring that "its state of neutrality could

to this war: "Elle a montré, d'abord, la nécessité qu'il y a de distinguer une neutralité *de fait* et une neutralité *de droit* ... D'autres Etats, en Amérique surtout, tout en adressant une déclaration de guerre à l'Allemagne et à l'Autriche-Hongrie, n'ont fait suivre celle-ci d'aucun acte d'hostilité: belligérants simplement passifs, ils sont ainsi restés neutres *en fait* sans l'être en droit ... ils ne pouvaient pas suivre leur déclaration de guerre d'hostilités effectives." See also Laun 1950 p. 100; Eagleton 1948 p. 390.

⁹⁹ T. Komarnicki: *The Place of Neutrality in the Modern System of International Law*. RdC 1952/I p. 419. It can be argued that Brazil belonged to this category, although the Government of Brazil "only informed the Secretary of State of the United States that the President of Brazil had approved a law 'which revokes Brazil's neutrality in the war between the United States of America and the German Empire'." United States Naval War College, International Law Documents, 1917 p. 64.

¹⁰⁰ As early as April 1917 the Government of Costa Rica placed its seaports and territorial waters at the disposal of the United States and its allies, an offer which was not accepted. Nevertheless Costa Rica severed her diplomatic relations with Germany on 21 September 1917, and war was formally declared on 24 May 1918. The Tinoco government adopted a number of measures in harmony with its declaration of war. Orders were issued for a number of enemy aliens to be brought under surveillance, while their possessions were placed under a rigorous control. Quoted from P.A. Martin: *Latin-America and the War*. 1925 pp. 508/09, who remarks with regard to the declaration of war of the Tinoco government: "This last act resulted in an extraordinary situation. In the eyes of the United States and the Entente, Costa Rica was not at war with Germany because the government which had declared war had, from their standpoint, no legal existence. But from the standpoint of Germany, Costa Rica was at war with that country since the Imperial German government had formally recognized the Tinoco regime." (p. 508). Cf. U.S. Naval War College, International Law Documents, 1917 pp. 77, 162; AJIL 1939 Suppl. pp. 211/12.

not consider the United States as a belligerent subject to the common rules of International Law".¹⁰¹ The Government of Uruguay decreed, on 18 June 1917 that "no American country which in defence of its own rights should find itself in a state of war with nations of other continents will be treated as a belligerent".¹⁰²

Notwithstanding the infringements on the law of neutrality, the real significance of these actions, which did not go beyond severing relations with Germany and Austria, consisted only in a testimony to the cause of American cooperation. This cooperation, however, was understood in terms of moral contribution to the ideals which the United States and her allies were striving to uphold. For the purpose of international law, their status as neutrals remained unaffected. The implications of a formal state of war, legalistic as they may be, were duly respected, the dichotomy of peace and war included. This became evident when the *Infanta Isabel de Borbon incident*¹⁰³ occurred between Uruguay and Germany where the problem of formal war was involved.

¹⁰¹ Déak-Jessup: *A Collection of Neutrality Laws*. 1939 p. 564.

¹⁰² U.S. Naval War College, *op. cit.* p. 249.

¹⁰³ The incident is related by Martin 1925 pp. 375 ff. as follows: "In the spring of 1918 the Uruguayan government became involved in a diplomatic controversy with Germany which for a time threatened serious consequences. Early in March a military mission consisting of three colonels and a captain under the command of General Dufrechou, Chief of the General Staff, left Montevideo for Barcelona on the Spanish steamer *Infanta Isabel de Borbon* with the object of visiting the Allied front. Between the Canary Islands and Cadiz the German submarine 214, commanded by Captain Max Valentine, held up the *Infanta Isabel*. After examining their passports the commander of the submarine forced the members of the mission to come aboard his vessel, where he told them that he considered them as prisoners of war. He proposed to take them as such to Germany unless they gave their word that they would abandon their journey to the Allied countries. To justify his attitude he claimed that war existed between Uruguay and Germany according to instructions he had received from the German Admiralty. General Dufrechou stated that it was untrue that a state of war existed unless it had been declared subsequent to his departure from Montevideo ... As these reasons were not regarded by Captain Valentine as satisfactory the members of the mission were obliged to promise not to extend their journey beyond Spain and gave their word to this effect, though formally protesting against what they regarded as an outrage ...

The Uruguayan Foreign Office promptly initiated negotiations looking to the release of the members of the mission from their word of honour, at the same time demanding an explanation from the German government. After having learned from the Uruguayan legation in Spain the details of the detention of the Mission, which had meanwhile arrived safely at Madrid, the Uruguayan Foreign Office instructed the Uruguayan legation at Berne to ask "the Imperial Foreign Office whether the captain of the submarine acted in accordance with the instruction from it, which means whether it considers that a state of war exists between Germany and Uruguay of which the Uruguayan government has not been informed by any third party ..."

Forced to give a definite answer, the Berlin Foreign Office stated early in May "that it did not consider itself in a state of war with Uruguay, and that further, the rupture of relations was not provoked by Germany".

II. *The confiscation of enemy property by belligerents who do not commit themselves to more than a declaration of war.*

The legal technicality of war short of hostilities is to be considered in the light of the rights and duties which may be incurred by any such form of 'waging war'¹⁰⁴ There is common agreement that a State engaging in a formal war entirely short of hostilities is entitled to make use of the following rights and duties of a belligerent: It may apply its war legislation relative to enemy subjects, i.e., internment, custody of enemy private property, or relative to 'trading with the enemy'. The members of their armed forces, if captured wherever they may be, will be made prisoners of war. States waging war short of hostilities represent, so to speak, small shareholders, which will profit by victory but to whom the consequences of a lost war will equally apply.

Since the end of World War I the great victorious States increasingly practised the covering of reparations by expropriating enemy private property.¹⁰⁵ They generally justified these measures by the great material losses they had suffered. This gives rise to the legal question whether or not belligerent States partaking only formally in a state of war, can proceed in the same way although they did not suffer any considerable material loss.

The issue was to be taken into consideration in the *Nottebohm case*.¹⁰⁶ At the outbreak of World War II Guatemala made a precise declaration of neutrality. Thereupon it took all the defence measures of a neutral national economy against the war measures of belligerents. No Guatemalan war measures were taken before 10 December 1941 when Guatemala entered World War II. Her participation, however, remained in the nature of a war short of hostilities. It did not go beyond some assistance given to the United States in her effort to meet the German submarine campaign in the Caribbean, to guard against the enemy raids and to co-operate in the defence of the Panama Canal.

Two years after her formal entrance into World War II Guatemala thought it expedient to arrest and deport Friederich Nottebohm, one of the chief directors of Nottebohm Hermanos, and as a war measure to confiscate without compensation the last remaining assets of Friederich's property.

Up to now no exhaustive rules on the subject-matter have been established in international law and the decisions of national courts,

¹⁰⁴ The observations of Fauchille 1921/II p. 650 on the subject-matter are made too much *in abstracto* when he declares: "Au point de vue de l'attitude guerrière, il n'y eut pas dans la réalité de différences entre le Chili ou la République Argentine, par exemple, qui ne déclarèrent pas la guerre à l'Allemagne, ou à l'Autriche-Hongrie, et d'autres Etats comme le Libéria, le Panama, Cuba, Haïti, le Honduras, le Nicaragua ou le Guatemala qui, au contraire, ont procédé à de véritables actes d'hostilités; ils sont *en fait* demeurés neutres, quoiqu'ils ne le fussent point *en droit*."

¹⁰⁵ See Article 297 of the Treaty of Versailles. K.G. Seeliger: *Das ausländische Privateigentum in der Schweiz*. 1949 pp. 18-30.

¹⁰⁶ I.C.J. April 6, 1955; Recueil 1955 p. 4.

the works of learned writers, and State practice since the opening of this century are without consistency in this field. The definition of the concept of *enemy* has given rise to strong controversies between Anglo-Saxon and Continental State practice and is far from being settled. With regard to a participation in war short of hostilities there are, however, certain indications of the trend of war confiscation principles:

(1) Sequestration of private property as a war measure must be *closely related to military necessity*. Such is already the case in the event of private property being used, or likely to be used, for the benefit of the enemy. No sequestration can become expropriation without due compensation unless, in the case of the expropriated person being an enemy subject, compensation is provided for him in the peace treaty, or, of a neutral subject, if he has been convicted of (a) acts during the war hostile to his country of residence, or (b) acts of assistance to the enemy, or (c) acts contrary to the laws of war.¹⁰⁷

(2) The possible expropriation of sequestered enemy property must be justified by a *proportionality* to the war efforts of the expropriating State. The principle of proportionality between war efforts and share in the benefits of a victory had been expressed in the Moscow Meeting of Foreign Ministers in 1945. During World War II, among 50 States which declared war against the Axis Powers, only 21 — including two Soviet political subdivisions — were regarded for purposes of participation in the Paris Peace Conference of 1946 as having “actively waged war with substantial military force against European enemy states”.¹⁰⁸ Among the remaining 29 States several declared war upon Germany at the beginning of 1945, that is to say, at a time when it was obvious that the Axis Powers were to lose World War II. Any such entrance into war is not likely to confer upon the belligerent the right to expropriate enemy private property.¹⁰⁹

(3) Expropriation after the end of hostilities while the formal state of war continues must have a *chronological and factual causality* to the

¹⁰⁷ Fawcett, *Nottebohm case*, I.C.J., Oral Arguments 2 March to 8 March 1955 Distr. 55/35 bis, p. 74. This author observed in addition that “in no circumstance may a belligerent confiscate the property of an alien for the public use on the pretext that the taking of the property is justified as war measure”, when the taking does not fall within the scope of generally recognized war measures. In his pleading Fawcett pointed to the fact that one of the very late interventions by Guatemala in Friederich’s property were taken under Decree 900 dealing with Agrarian Reform.

¹⁰⁸ Moscow Meeting of Foreign Ministers, 1945, Department of State Conference, Series 79, p. 10.

¹⁰⁹ In the Krupp Trial the International Military Tribunal attributed a certain relevance to the fact that “war is by definition a risky and hazardous business. That is one of the reasons that the outcome of war, once started, is unforeseeable and that, therefore, war is a basically unrational means of ‘settling’ conflict”. A.D. 1948 No. 214 p. 628.

It may be said that no benefit from any participation in a war short of hostilities could be claimed which are justifiable only by the hazardous character of the participation in war.

operation of war. The German Enemy Property Act of 1949 which was issued by Great Britain might be justified by the existence of a formal state of war with Germany, which at that time, was already a subject of much controversy. Under the Act, however, the property of a person who became a German national resident in Germany during the year 1949 would be German enemy property.¹¹⁰

Paragraph 2. When does a formal war end?

1. Legal doctrine with regard to the termination of a state of war.

As to the end of war, the concept of formal war is specified by the fact that the cessation of armed hostilities does not necessarily terminate a state of war.¹¹¹ The conclusion of an armistice during a formal war is but a preliminary step towards the termination of war and is never conclusive for the end of war.¹¹²

Contrary to the initiation of a state of war, its abrogation is not regulated by conventional international law. Certain laws of war, which deal expressly with the end of war, necessarily refer to the customary rules of international law in this field.¹¹³ According to these rules, a

¹¹⁰ E.J. Kohn: *German Enemy Property*. ILQ 1950 p. 532 remarks that "this is possibly of considerable importance, because the basic law of the German Federal Republic contains a provision by which a very large number of persons now residing in Germany have acquired German nationality in 1949. Under the Rules of Accounting the property of a person who after 24 January 1946 acquires German nationality is not considered as German asset".

¹¹¹ Cf. Starke 1947 p. 258; R.Y. Jennings: *Government in Commission*. BYB 1946 pp. 112 ff. declares: "the mere cessation of hostilities, however, does not of itself end war, there must also be a cessation of the *animus belligerendi*, and where ... a belligerent state issues a categorical assertion that the relationship of war persist between it and another state and acts on that assumption, there does not seem to be any real room for doubt that there is a continuing state of war in the technical sense".

¹¹² In law, the termination of a state of war means the implementation of the laws of peace. It follows that the legal termination of war is not necessarily simultaneous with an end of war as understood by historians or sociologists. G. Ferrero: *The Forms of War and International Anarchy*. La Crise Mondiale 1938 p. 86 observes as historian with regard to the Napoleonic Wars:

"Now it is obvious that if the history of the Napoleonic Wars were written in the same way as that of the wars of the eighteenth century, all the so-called short wars that bathed Europe in blood from the breach of the Peace of Amiens in 1803 down to the Peace of Paris of 30 May 1814 must be considered as a single war, similar to the Seven Years' War. It would have to be called the Eleven Years' War. Although the fortunes of war fluctuated greatly, there was no break in its continuity. The peace treaties that might be said to have put a stop to it from time to time — those of Pressburg and Tilsit, and the first Peace of Vienna — were in reality mere truces between certain of the belligerents."

¹¹³ So, for instance, Article 5 of Hague Convention VIII of 1907: "A la fin de la guerre, les Puissances contractantes s'engagent à faire tout ce qui dépend d'elles pour enlever, chacune de son côté, les mines qu'elles ont placées."

state of war can come to an end by peace treaty, by mere ending of hostilities and by conquest and subjugation of the enemy State, often referred to as *debellatio* by Continental internationalists.¹¹⁴

The most normal way of ending a war is certainly by peace treaty. The coming into force of the latter determines the exact moment of the initiation of the state of peace.¹¹⁵

The second alternative for terminating formal war by long suspension of hostilities without a peace treaty being made is open to a great many uncertainties.

What period of suspension of war is necessary to justify the presumption of the restoration of peace has never yet been settled and must in every case be determined with reference to collateral facts and circumstances.¹¹⁶

By and large it can be said that a formal war is terminated by mere cessation of hostilities, if the following preliminary conditions have been fulfilled: (1) a sufficiently long lapse of time since the end of military hostilities leaving no doubt upon the intention of the parties to the conflict to have intercourse in pursuance of the law of peace; (2) some clear factual implication of such an intent, for instance restoration of diplomatic relationships, admission to the international community of collective security; integration in a defence system, etc.¹¹⁷

¹¹⁴ Cf. Kunz 1935 pp. 58 ff.; Wheaton-Keith 1944 p. 615; Guggenheim Lehrbuch II pp. 819 ff.; Oppenheim-Lauterpacht Intl 1952/II pp. 596 ff.; K. Strupp: *Wörterbuch des Völkerrechts*. 1924/I pp. 713 ff.; Verdross 1937 p. 290.

¹¹⁵ Thus, the first World War came to an end by the Paris Peace Treaties, although separate peace treaties, coming into force at different times, were concluded with each enemy. The Paris Peace Treaties of 1947 terminated the state of war between the Allied Powers and Italy, Hungary, Rumania, Bulgaria and Finland. Similarly the state of war between the Allies and Japan was ended by the San Francisco Peace Treaty of 1951 although "this peace treaty was, in an unusual way, prepared diplomatically and not by a peace conference". J. Kunz: *Ending the War with Germany*. AJIL 1952 p. 114.

¹¹⁶ M. Seward, Secretary of State to Spanish Minister Senor Goui, July 22, 1867; Hyde: *International Law*. 1947/III p. 2385; Eagleton AJIL 1938 p. 22.

¹¹⁷ A. von Verdross: *Völkerrecht*. 1937 p. 290; Kunz 1935 pp. 59/60; E. Kaufmann: *Deutschlands Rechtslage unter der Besatzung*. 1948 p. 15; Bindschedler SJIR 1949 p. 46 holds that the restoration of diplomatic relations is not absolutely necessary for the termination of a state of war; G. Sausser-Hall: *L'occupation de l'Allemagne par les Puissances Alliées*. SJIR 1946 p. 32.

Laun 1950 p. 99 formulates the ending of formal war as follows: "Wenn weder nach dem Einverständnis beider Streittheile Kampfhandlungen zulässig sind noch Waffenruhe oder Waffenstillstand besteht, kann kein Krieg im Sinne des allgemeinen Völkerrechts vorliegen."

Termination of war through simple cessation of hostilities has occurred after the war between Russia and Persia in 1801, the war between France and Mexico in 1867, Spain and Chili in 1867, and in recent times after the war between Greece and Albania which broke out at the occurrence of World War II. Cf. Oppenheim-Lauterpacht Intl 1952 p. 557 with references to wars of the eighteenth century; Stone 1954 p. 639.

Grob 1949 p. 323 rejects the concept of formal war in the following terms:

II. *Practice.*

A. The abrogation of the state of war between Turkey and the Allied Powers after the Moudros Armistice in 1918.

Turkey, which was an ally of Germany in World War I, terminated her military operations against the Allied Powers in the Near East by concluding an armistice on 31 October 1918 at Moudros. Thereupon negotiations were opened in June 1919 in Paris between representatives of the Porte and the Allied Powers which came to a standstill on 20 June 1919. Only one year later peace negotiations were resumed between the said parties which resulted in the signing of the peace treaty of Sèvres dated 10 August 1920. This treaty was intended to give effect to the desire of the contracting parties which strove to replace war by a lasting peace.¹¹⁸ As a result of the non-ratification of the treaty of Sèvres the state of relations with Turkey continued to be determined by the rule of a formal state of war.¹¹⁹

The legal situation in this regard was complicated by the fact that insurgent forces in Turkey succeeded in deposing the Government of the Porte in Constantinople which was replaced by the Grand National Assembly in Angora, the so-called Angora government. In September 1921 the French government empowered M. Franklin-Bouillon to negotiate with the Angora government, on behalf of the French government, with regard to French prisoners, the protection of minorities in Cilicia, and other points involving the evacuation of Cilicia by French troops. These negotiations led up to the Angora Agreement, signed on 20 October 1921. Article 1 of that treaty provided that with the signature of the Agreement "the state of war will cease between the High Contracting Parties".

The Angora Agreement gave rise to an exchange of views between Great Britain and France which turned above all on the meaning to be attributed to Article 1. Great Britain observed that

Clearly, this phrase implies something more than a local armistice, because a state of armistice is still technically a state of war. Nothing is said as to whether the Agreement is provisional pending a

"According to a delusion ... a declaration of war leads as inevitably as day follows night, to the creation of that technical phantom called 'state of war', war in — *the* — legal sense. According to another delusion this phantom continues in existence until something has been done to remove it ... Hence the "state of war" which in 1938 was still hovering over little Liechtenstein and promised to become a permanent phenomenon in the European political picture." This author apparently ignores the possibility of ending a state of war by mere cessation of hostilities.

¹¹⁸ "... désireuses que la guerre, ... fasse place à une paix solide et durable..."

¹¹⁹ Cf. B. Nolde: *La fin de la guerre en Russie au point de vue de Droit International*. RDILC 1923 pp. 395 ff., p. 401: "Les puissances continuaient à considérer que les hostilités n'avaient pas cessé et que la guerre n'avait pas pris fin."

general peace between the Allies and Turkey or whether it is intended to have purely a local scope. The latter could hardly be the case, as some of the Articles appear to be of general application to Turkey. It is presumed, therefore, that the Agreement establishes a state of peace between France and the Grand National Assembly.¹²⁰

The French government, however, pointed out in its answer given by M. de Montille that the Angora Agreement did not go beyond the scope of a local agreement which had been concluded with a political entity bare of either *de facto* or *de jure* recognition.¹²¹

The formal state of war was terminated before the ratification of the Treaty of Lausanne in 1924 which stipulated that 'the state of peace will be definitely re-established'.¹²²

¹²⁰ The Marquess Curzon of Kedleston to the Count de Saint-Antaire 5 Nov. 1921, State Papers 1921 p. 294.

¹²¹ M. de Montille to the Marquess Curzon of Kedleston, 17 November 1921, State Papers 1921 pp. 298 ff. pp. 301/02:

"Les mots "cessation de l'état de guerre", qui figurent à l'article 1^{er}, ont paru au Gouvernement de Sa Majesté être des termes impropres pour définir un armistice local. Votre Seigneurie estime, en outre, que mention aurait dû être faite du caractère provisoire de l'arrangement intervenu. La rédaction adoptée donnerait, au contraire, à l'accord une apparence d'un véritable Traité de Paix. Ainsi que l'a déjà marqué verbalement à Lord Harding le Directeur des Affaires politiques, l'Accord d'Angora ne constitue pas un Traité de Paix. Ce n'est qu'un arrangement de portée locale conclu avec un pouvoir qui n'est reconnu ni *de jure* ni *de facto*, mais qui a manifesté une autorité, un patriotisme et une loyauté propres à le faire considérer comme capable de tenir et de faire exécuter les engagements qu'il a contractés. D'une manière générale, si l'Arrangement d'Angora eût constitué un Traité de Paix, il aurait dû, suivant la Constitution, être soumis à la ratification du Parlement. Or, il a été simplement approuvé par le Gouvernement français et aucune ratification parlementaire n'a été sollicitée. Le Gouvernement français considère, d'autre part, que l'usage des expressions "d'armistice" et "d'arrangement provisoire" eût risqué d'inquiéter les populations en leur faisant craindre une reprise des hostilités".

Cf. Nolde RDILC 1923 p. 402: "Il résulterait de cette correspondance que, de l'avis des deux Gouvernements les plus intéressés dans les affaires du Proche-Orient, même la signature par l'un d'eux d'un accord avec la Turquie, réglant de nombreuses questions politiques, et autres d'une importance primordiale, ne devait pas être considérée comme le rétablissement de la paix avec cette Puissance."

¹²² The inconvenience of the continuation of a formal state of war for six years after the cessation of hostilities was mitigated by a number of decrees and acts resuming normal relations mainly in the commercial field. McNair observes with regard to Great Britain that "in order that British traders might not suffer from the competition of commercial rivals not handicapped by a state of war, the Board of Trade issued a general licence to trade with those countries (Turkey and Bulgaria) dated 17 February 1919, and trading took place thereunder. There is little doubt that as a matter of law apart from any exercise of power by the Crown under the Termination of the Present War Definition Act 1918 a state of war with those countries continued until the respective peace treaties came into force". McNair 1944 p. 184.

B. The termination of World War I between Germany and Russia.

After the October Revolution the Bolshevik government addressed an appeal on 28 November 1917 to the Central Powers for the termination of hostilities. Thereupon an armistice was concluded between the Central Powers and the representatives of the Bolshevik government, dated 16 December 1917. Negotiations for the conclusion of a peace treaty were taken up and continued until 10 February 1918 when Trotzky declared that Bolshevik Russia refused to sign a peace treaty but had decided to terminate the war without any formalities. As a result Germany denounced the armistice agreement and resumed military hostilities.¹²³

Finally the German-Russian peace treaty between Bolshevik Russia and the Central powers was signed at Brest-Litovsk on 3 March 1918 and came into force on 29 March 1918. Article 1 of that treaty declared that the state of war between Germany, Austria-Hungary, Bulgaria and Turkey on the one hand and Russia on the other had been terminated and that the contracting parties had decided to continue their relations in peace and friendship.¹²⁴

After Germany had been defeated by the Allies, the former accepted in the Armistice of 11 November 1918 the cancellation of the treaties of Brest-Litovsk and Bucharest as well as all its complementary treaties. The annulment of these treaties was confirmed in Articles 116 par. 2 of the peace treaty of Versailles.¹²⁵ Moreover, two days after the Armistice of 11 November 1918, Soviet Russia, in its turn, had denounced the peace treaty of Brest-Litovsk by unilateral declaration.¹²⁶

The legal question at stake is whether by Germany's accepting of the abrogation of the Brest-Litovsk Treaty under the terms of the Versailles peace treaty only the terms of the Brest-Litovsk treaty were abrogated or whether the entire legal transaction of the Peace Treaty was thereby annulled. In the latter case the formal state of war between Russia and Germany would have come to an end only with the conclusion of the treaty of Rapallo signed on 16 April 1922.

¹²³ Cf. Hyde 1947/III p. 2386 n. 4.

¹²⁴ Cf. K. Strupp: *Die Friedensverträge. I. Die Ostfrieden.* 1918 p. 1 ff., 233/35, 242. Niemeyer-Strupp: *Die völkerrechtlichen Urkunden des Weltkrieges.* Vol. VI, 1922 pp. 969 ff.

¹²⁵ "Conformément aux dispositions insérées aux articles 259 et 292 des Parties IX (Clauses financières) et X (Clauses économiques) du présent Traité, l'Allemagne reconnaît définitivement l'annulation des traités de Brest-Litovsk, ainsi que tous autres traités, accords ou conventions passés par elle avec le Gouvernement maximaliste de la Russie."

¹²⁶ "Le Comité Central Exécutif Panrusse des Soviets déclare solennellement par les présentes que les clauses de la paix signée à Brest-Litovsk le 3 mars 1918 ont perdu leur force et vigueur. Le traité de Brest-Litovsk (ainsi que la convention complémentaire signée à Berlin le 27 août et ratifiée par le Comité Central Exécutif Panrusse le 6 septembre 1918), dans son ensemble et dans toutes ses dispositions, est déclaré annulé ..." Quoted from Nolde RDILC 1923 pp. 405/06.

It can be said that the formal state of war between Russia and Germany must be regarded as terminated with the ratification of the peace treaty of Versailles. The Soviet government, at the moment of concluding the Brest-Litovsk treaty, had only the status of a belligerent and was not recognized either *de facto* or *de jure*. The Brest-Litovsk treaty brought the material war between Germany and insurgent factions of Imperial Russia to an end. As the Soviet government had not competence under international law to initiate war by mere verbal declaration or to re-establish a state of war by annulling verbally the Brest-Litovsk treaty, the only way of abrogating the Brest-Litovsk treaty by Soviet Russia would have consisted in taking up arms again and recommencing hostilities against Germany. This did not occur. The Allied Powers, in submitting Germany to the terms of Article 116 of the Treaty of Versailles, did not intend thereby to reopen the formal state of war between Soviet Russia and Germany but rather to terminate World War I also in favour of Imperial Russia, which at the time of concluding the Versailles Treaty was still the officially recognized government of Russia. Article 116 deprives Germany of the financial and economic advantages which she had acquired under the Brest-Litovsk treaty. The purpose of this Article was to weaken Germany's post-war economic power and to act loyally vis-à-vis Imperial Russia in the event she would succeed in suppressing the Bolshevik revolution.¹²⁷

¹²⁷ To an opposite effect Nolde RDILC 1923 p. 406/07: "Ainsi, la Russie et l'Allemagne et ses anciens alliés, par voies différentes, ont annulé le traité de Brest-Litovsk et la clause de ce traité qui prévoyait la cessation des hostilités et le rétablissement de la paix entre ces deux Puissances. Si, de fait, les hostilités ne furent pas reprises, en droit l'état de paix n'existait plus, et pour le rétablir il était nécessaire de conclure de nouveaux traités ou de passer de nouveaux actes constatant le rétablissement de rapports normaux entre les anciens belligérants."

Nolde considers the Rapallo treaty of 16 April 1922 as putting an end to the formal state of war. This treaty, which gives effect to "the complete resumption of normal relations" between Soviet Russia and Germany does not have the characteristics of a peace treaty. It must be rather considered as a *de jure* recognition of the Soviet government.

In *Société Peugeot contre Lianosoff et Kochtaria* the French court had to pronounce itself upon the end of war in Russia which was material for the maturity of payments contracted in a commercial treaty which had been concluded during World War I. The Tribunal civil de la Seine held in its judgment of 19 April 1923 that for the purpose of that commercial treaty, the end of war must be considered in its material sense which was concluded under the Brest-Litovsk treaty. The court said in an *obiter dictum*: "Attendu qu'à la vérité, l'article 116 du Traité de Versailles a annulé le traité de Brest-Litovsk au regard de la France et de l'Allemagne, mais qu'il n'a pu avoir pour effet de supprimer les conséquences antérieurement réalisées de ce dernier traité et, notamment, le rétablissement en fait des relations normales et pacifiques de la Russie avec l'Allemagne et ses alliés." Quoted from Nolde RDILC 1923 p. 396. See also P. Mantoux: *Les délibérations du Conseil des Quatre*. 1955 vol. II pp. 454/55.

Paragraph 3. The termination of a state of war by unilateral declaration.

I. Traditional doctrine and State practice.

Although formal war can be started by one party, its termination presupposes the consent of both parties, if the enemy State survives as a sovereign State. From this rule it has been derived that the implementation of a peace treaty ends the war only with regard to parties who have ratified the latter.¹²⁸

In general a unilateral declaration is liable of terminating a state of war only under the condition that the other party to the conflict does not resume hostilities or otherwise declines to recognize the unilateral declaration as possessing the significance which its enemy attaches to it. In other words, a state of war cannot be terminated by unilateral declaration without the mutual consent of the belligerents.

¹²⁸ After World War I China declared by decree of 15 September 1919 that the peace with Germany was re-established. She did not ratify the Peace Treaty of Versailles. The formal state of war, however, did not come to an end before a corresponding Sino-German agreement which was signed on 20 May 1921. Cf. Preamble to Agreement Regarding the Restoration of Peace between China and Germany, 9 LON Treaty Series, 1922 p. 272. The same was true with the unilateral decree of Costa Rica on 4 February 1920 which did not terminate the formal state of war with Germany until the latter issued on 15 May 1921 a decree to the same effect. See Kunz 1935 p. 58; Guggenheim Lehrbuch II 1950 p. 820.

The principle of mutuality for the abrogation of a formal state of war was particularly stressed at the end of World War I with regard to the United States of America which refused to ratify the Versailles Treaty. On 2 June 1921, the President approved a 'Joint Resolution terminating the state of war between the Imperial German Government and the United States of America and between the Imperial Austro-Hungarian Government and the United States of America'. Yet, the state of war between these countries was not abrogated under international law until a bilateral treaty to such an effect was established. In the case of Germany such an agreement was reached in the Treaty of Berlin signed on 25 August 1921 'restoring Friendly Relations' between the two countries. This treaty, which was not a peace treaty *stricto sensu*, included in its Preamble sections of the American Joint Resolution of 2 July, to the effect that after ratification of the Berlin Treaty the President of the United States could declare on 14 November 1921 "that the war between the United States and Germany terminated on 2 July 1921". For further particulars see M.O. Hudson: *The duration of war between the United States and Germany*. Harvard Law Review 1926 pp. 1020 ff.; Hyde 1947/III pp. 2387/88, D. Ottensooser: *Termination of war by unilateral declaration*. BYB 1952 pp. 435/37. As to World War II Kunz AJIL 1952 p. 114 rightly observes that the state of war with Japan will come to an end only with regard to those States which have signed and which will ratify the San Francisco Peace Treaty of 1951, but not with regard to those States who did not even sign it, as for instance the Soviet Union, Poland, Czechoslovakia, or who did not accept the invitation to the San Francisco Conference, as India and Burma, or who were not even invited to this conference, as China.

II. Defeat by "unconditional surrender" and termination of formal war by unilateral declaration.

The unconditional surrender of the German armed forces in 1945 was the prelude to legal developments radically different from those of World War I. A new phase in international relations was opened up by the Allied Powers' unanimity in agreeing to bring World War II to an end solely by a political unconditional surrender of the forces of the *Dritte Reich*.¹²⁹ In pursuance of this decision, after the unconditional surrender of the German military forces on 8 May 1945, Great Britain, the United States of America, Soviet Russia, and France assumed 'supreme authority' with regard to Germany by the joint Declaration of 5 June 1945, the so-called Berlin Declaration.¹³⁰

Very soon, however, the Allied Powers made it abundantly clear that they did not intend to annex Germany.¹³¹

¹²⁹ "Unconditional surrender of the German and Japanese Forces which resulted in their laying down arms without the special reservations usually inserted in armistice conventions, does not *ipso facto* imply that the capitulating power abandons all claim to the benefits of the Hague and Geneva Conventions in favour of its nationals." Max Huber in a letter dated 6 September 1946 to the Secretary of State Byrnes, quoted from A. Freeman: *War Crimes by Enemy Nationals Administering Justice in Occupied Territory*. AJIL 1947 p. 605 n. 138; cf. Oppenheim-Lauterpacht IntL 1952/II pp. 552/54; Stone 1954 p. 645.

¹³⁰ For a summary of the political evolution leading up to that declaration see A.M. Stuydt: *La genèse d'une "capitulation sans conditions"*. Ned.T.I.R. 1955 pp. 24 ff.; cf. also A. Gros: *La condition juridique de l'Allemagne*. RGDIP 1946 pp. 67 ff.; Freeman AJIL 1947 p. 63; Ottensooser BYB 1952 pp. 437 ff. M. Virally: *L'administration internationale de l'Allemagne*. 1948 p. 24 holds that owing to that declaration the *de jure* recognition of the German government was cancelled.

¹³¹ In *R. v. Boxtroll* (1946) All E.R. 635 (1947) K.B. 41 it was expressed to all intents and purposes that the British Government relied on the continued existence of Germany as a State.

In legal doctrine, the challenge to an opposite effect was given by Kelsen: *The legal status of Germany according to the Declaration of Berlin*. AJIL 1945 pp. 518 ff. Kelsen regarded the unconditional surrender of Germany in the light of a subjugation or *debellatio* and thereby reached the following conclusion:

"After Germany's unconditional surrender ... the status of belligerent occupation has become impossible. This status presupposes that a state of war still exists in the relationship between the occupant state and the State whose territory is under belligerent occupation. This condition implies the continued existence of the State, whose territory is occupied and consequently, the continued existence of its government recognized as the legitimate bearer of the sovereignty of the occupied State." Cf. Freeman AJIL 1947 p. 605; W. Grewe: *Ein Desatzungsstatut für Deutschland*. 1948 pp. 58/59; Virally 1948 pp. 35/41. Certain writers, without denying the continuance of Germany as a State, justified the termination of a state of war in 1945 by inherent legal meaning of 'unconditional surrender'. Cf. Sauser-Hall SJIR 1946 p. 32; Gros RGDIP 1946 p. 70; F.A. Mann: *The Present Legal Status of Germany*. Jahrb.iaöR 1948 pp. 27 ff. For a bibliographical compilation on this subject see Jahrb.iaöR 1948 pp. 222/23. In spite of the unconditional surrender Germany continued to exist as a State after and owing to the Berlin Declara-

The termination of the state of war with Germany was declared by the Western Powers in 1951 by unilateral declarations.¹³² On July 9, 1951, Great Britain published in the *London Gazette* a declaration to the effect that

It is notified that the formal state of war with Germany is terminated as from four o'clock p.m. today, the 9th July, 1951.

On the instruction of His Majesty's Principal Secretary of State for Foreign Affairs the United Kingdom High Commissioner in Germany addressed on 9th of July, 1951, a communication to the Federal Government of Germany in the following terms: ...

His Majesty's Government... bearing in mind... that the formal state of war with Germany has continued to subsist so far as the municipal law of the United Kingdom is concerned, and will so continue until the appropriate action is taken by His Majesty's Government to terminate it, ...

have determined that without prejudice to the Occupation Statute, or to the decision of questions the settlement of which must await the conclusion of a treaty, the formal state of war between the United Kingdom and Germany shall be immediately terminated...¹³³

tion, which deals with the 'Germany of 1937' as a continuing entity. Cf. Kunz 1952 p. 116. As Germany had been engaged in a formal war with the Allied Powers, the termination of that formal war had to be achieved by one the legal means to that effect under international law. It follows that there could not be more than belligerent occupation "so long as a state of technical war continues to exist, even though hostilities have ceased in the complete defeat of one of the belligerents". Jennings BYB 1946 p. 134. This has become the dominant opinion in international law. But see also the study *de lege ferenda* of V.V. Pella: *Fonctions Pacificatrices du droit pénal supranational et fin du système traditionnel des Traités de Paix*. RGDIP 1947 pp. 19 ff.

Grewe 1948 pp. 47 ff., 74 ff.; Stödter 1948 pp. 46, 115; W. Friedmann: *The Allied Military Government of Germany*. 1947 pp. 64, 67; Kaufmann 1948 pp. 14 15; Bindschedler SJLR 1949 pp. 37, 44 ff.; J. Kunz: *Ending the War with Germany*. AJIL 1952 p. 116 who refers for a full investigation on the subject-matter to his work: *The Status of Occupied Germany under International Law: A legal Dilemma*. The Western Political Quarterly III No. 4 1950 pp. 538 ff. See also U. Meister: *Stimmen des Auslandes zur Rechtslage Deutschlands*. ZaöRV 1950 pp. 173 ff.

¹³² Scheuner ArchivöR 1951 p. 319 declares: "Inhaltlich folgen die rechtlichen Beschlüsse der einzelnen Länder mit gewissen Abweichungen den in den interalliierten Beratungen festgelegten Richtlinien. Als Vorbild dient die einseitige Beendigung des Kriegszustandes mit Deutschland durch Joint Resolution des amerikanischen Kongresses am 2 Juli 1921." Cf. Kunz AJIL 1952 pp. 114 ff.; Ottensooser BYB 1952 pp. 539/40.

¹³³ The *London Gazette*, No. 39279, July 9, 1951. The reservation was made that "His Majesty's Government ... must reserve the right to retain any money or property subject to control by virtue of Trading with the Enemy legislation or in the custody of any prize court but desire to recall that under that legislation no obstacle has been placed since the 23rd March, 1949, in the resumption of full commercial and financial dealings between persons in the United Kingdom and persons in Germany, or of the acquisition of property not then subject to control, and this position will remain unaltered."

While the French decree of the same day was specified by a *Rapport* of the French Minister of Foreign Affairs to the effect that the measures decreed are applicable without exception to all German subjects,¹³⁴ the Secretary of State, when he was asked in the House of Commons whether the new state of peace was a peace with the whole of Germany or only with the Federal Government at Bonn, avoided all reference to Eastern Germany. He said: "This is in relation to the Federal Government of Germany.." ¹³⁵

What is the effect of any such unilateral declaration relative to the termination of a state of war? First of all, it must be borne in mind that the continuance of the state of war with occupied Germany did not at all constitute a departure from international law.¹³⁶ In history we find ample proof of the fact that a formal state of war can continue for quite a long period after the cessation of hostilities. It is just in the nature of the state-of-war doctrine, backed up by ample State practice, that the state of war can become so delicate and technical as practically to alter the concept of war as understood by the 'man in the street'. A formal state of war does not exist any less because the victor uses it as a machinery of control over the already conquered enemy. Various intermediate stages of coercive control between the extremes of annexation on the one hand and preliminary peace treaties without any control on the other have been held to be compatible with the rules of international law. The termination of hostilities, i.e., of war in the material sense during a state of war may be followed by a régime of belligerent occupation for several years.

¹³⁴ Décret No. 51-883, J.O., 83 (1951) pp. 7502 ff. "mettant fin aux conséquences de l'état de guerre en ce qui concerne le statut des ressortissants allemands en France.

Art. 1^{er}. — A dater de la publication du présent décret, les ressortissants allemands ne seront plus réputés ennemis.

Art. 2. — Le présent décret ne porte pas atteinte à la validité des mesures qui ont été ou seront prises sur les biens, droits et intérêts allemands, en application des accords internationaux auxquels la France est partie, ou afin de permettre l'exécution desdits accords.

Scheuner ArchivöR 1951 p. 320 holds the view that the French decree particularly stresses the municipal character and scope of the unilateral termination of war by declaration: "Hier wird nicht die Beendigung des Kriegszustandes, sondern lediglich der Fortfall der Feindeigenschaft der Deutschen angeordnet (Art. 1). Denn im Unterschied zu der Auffassung im britischen Staatenverband, die nach 1945 eine Fortdauer des Kriegszustandes bejahte, vertritt die dem französischen Dekret beigegebene amtliche Erläuterung den Standpunkt, dass mit der deutschen Kapitulation und der Uebernahme der höchsten Gewalt durch die Alliierten der Krieg "sur le plan des relations internationales" (J.O. S. 7502) sein Ende gefunden habe."

¹³⁵ Quoted from Ottensooser BYB 1952 who refers to 490, House of Commons Deb., 5s col. 42. To an opposite effect Scheuner ArchivöR 1951 pp. 321/22 who declares with regard to the attitude of the British Government: "Die Beendigung des Kriegszustandes und der Feindstellung deutscher Staatsangehöriger gilt für alle deutschen Staatsbürger, auch wenn die Notifizierung sich nur an die Bundesrepublik richtet. Das ist für Gross Britannien klargestellt..."

¹³⁶ To an opposite effect Jennings BYB 1946 p. 121.

In this specific concern the question in the case of Germany is whether a formal state of war could be maintained for seven years after the cessation of hostilities in spite of the fact that peaceful relations between the ex-belligerents had meanwhile been fully restored. The failure of the proclaimed Allied Government of Germany and its replacing by the *Bundesrepublik* in the west and the *Deutsche Demokratische Republik* in the east is certainly a persuasive argument to the assumption that the formal state of war must be regarded in international law as abrogated by time and collateral facts at the opening of the 1950's.¹³⁷

This, however, does not dispense with an investigation into the legal significance of the termination of a formal state of war by unilateral declaration of the victor, material war being ended by unconditional surrender. There are two different approaches to the problem, according to whether or not the conclusion of war by unilateral act is admitted.

(1) The first alternative, which recognizes the termination of war by unilateral act, may be argued as follows: A war, no matter whether it is juridically regarded or not as in the nature of a contractual relation (*Rechtsgeschäft*) is liable of being terminated by annexation of the vanquished. There is general agreement, that such a termination of war is tantamount to a termination by unilateral act, provided that the conquered enemy is *de facto* disabled as a subject of international law to such a degree that it could not regain that legal status unless the victor consented to it.

The factual disability of Germany as a subject of international law had been no doubt performed by the Allied Powers in May 1945. They, however, manifestly repudiated any intention to annex Germany. As the Allied Powers were entitled to close World War II by annexation, which indeed would have been a unilateral act, it is evident, by virtue of the

¹³⁷ Bindschedler SJIR 1949 p. 46 observed at that time with regard to the continuance of a formal war: "Wenn man die Verhältnisse in Deutschland und das Verhalten der Alliierten sowie der Neutralen in Berücksichtigung zieht, so ist wohl zutreffend, wenn man annimmt, dass der Krieg im völkerrechtlichen Sinne durch Einstellung der Feindseligkeiten sein Ende gefunden hat.

Die Äusserungen von alliierter Seite, wonach der Kriegszustand weiter bestehe, betreffen wohl alle eher den Krieg im Sinne des Landesrechts. Das geht besonders klar aus dem Hinweis des Petersberger Protocolls auf die gesetzlichen und praktischen Schwierigkeiten, welche der Beendigung des Kriegszustandes entgegenstehen, hervor." To a similar effect see Laun 1950 p. 97. Scheuner ArchivÖR 1951 pp. 320/21 reaches the following conclusion: "Ohne den französischen Standpunkt einer Kriegsbeendigung 1945, der wohl auf dem Gedanken beruht, das gegnerische Staatssubjekt Deutschland sei damals aufgelöst oder jedenfalls suspendiert worden (vgl. Virally, Die internationale Verwaltung Deutschlands 1948 S. 18, 24) oder die auf ganz anderen Gesichtspunkten aufgebaute Meinung von Rudolf Laun (Haager Landkriegsordnung 1950 S. 99 ff.) vom eingetretenen Kriegsende anzunehmen, möchte ich in der tatsächlichen Aufnahme friedlichen Handelsverkehrs und schliesslich sogar diplomatischer Beziehungen die Herstellung eines faktischen Friedenszustandes in den Jahren 1950/51 erblicken, der nunmehr durch Rechtsakt der Staaten mit innerstaatlicher, aber dank ihrer Notifizierung auch internationaler Wirkung bestätigt war." Cf. Domke ArchivVR 1955 p. 90.

legal maxim *de maiore ad minorem*, that the Allied Powers were *a fortiori* entitled to terminate the state of war with Germany by unilateral declaration, albeit leaving Germany as a political entity.

It is to be noted that the termination of war with Germany by unilateral declaration is *impliciter* the consent of the Allied Powers to have Germany recover its capacity as a subject of international law.¹³⁸ To that degree such a declaration is in the nature of an act of auto-limitation with binding effect under international law.¹³⁹

(2) The other alternative starts out from the premise that mutual consent is a *conditio sine qua non* for the legally effectual termination of a state of war. The instrument of capitulation, as far as Germany is concerned, manifestly expresses the will of Germany to terminate not only military operations but also the legal state of war with the Allied Powers. Inasmuch as further corroboration of Germany's will to terminate the state of war is said to be necessary, such will could be manifested only after the Allied Powers had rendered to Germany her capacity of acting as a subject of international law. The German Act of July 14, 1951¹⁴⁰ concerning the abrogation of municipal laws on war can be regarded as evidence to the will of Germany, when it recovered her status as a subject of international law, to consent to the general abrogation of a formal state of war under international law. This is true notwithstanding the fact that the termination of the formal state of war with Germany by unilateral declaration was answered by the German Federal Republic only by formal acceptance.¹⁴¹

It appears that according to both of these alternatives the formal state of war must be regarded to be abrogated by the unilateral declaration unless it could be shown that the state of war had already previously come to an end by time and collateral facts prior to that declaration. What then are the legal consequences of any such termination of war which is not brought about by an ordinary peace treaty? The effect of a termination of war by unilateral declaration with regard to the respective municipal laws is self-explanatory and needs no comment.¹⁴² With regard to international law, however, the legal effect does not go further than that of a termination of war by time and collateral facts and must be drawn from the latter by way of analogy:

(1) The said unilateral declaration abrogated the state of war *ex nunc* and re-established the state of peace. Neither of the ex-belligerents

¹³⁸ Cf. President Truman's letter of July 9, 1951 to both Houses of Congress concerning the termination of war with Germany in *New York Times*, July 10, 1951, reproduced in Scheuner ArchivöR 1951 pp. 314 ff.: "The relationship of conqueror and conquered is being replaced by the relationship of equality which we expect to find among free men everywhere."

¹³⁹ Cf. Pfluger 1936 pp. 249 ff.

¹⁴⁰ BGBl. I p. 391.

¹⁴¹ To an opposite effect Scheuner ArchivöR 1951 p. 318: "Der ganze Vorgang entbehrt also durchaus eines vertraglichen Charakters und bleibt auf einseitige Rechtsakte und deren Notifizierung beschränkt." Pfluger 1936 pp. 228 ff. Cf. Ottensooser BYB 1952 p. 442.

¹⁴² See also the U.S. President's letter of July 5th, 1951, to the Vice President inviting the Senate to lay the matter before the Congress.

could henceforth enact any of the laws on war to which he was so long entitled according to certain *rules of competence* in international law. Moreover, the original belligerent occupation of Germany by the Allied forces changed its legal status inasmuch as the occupation army retained only those rights "which are not based upon the persistence of a state of war either in international or in domestic law".¹⁴³

(2) As far as pre-war claims, resumption of pre-war conventions and treaties, restitution of property and other legal problems are concerned, the settlement of which, by its very nature, is feasible only by way of treaty, the law-creating effect of the said unilateral declaration differs from that which is brought about by a peace treaty. As a rule it is to be observed that with regard to any such settlement neither the customary nor conventional laws which generally substantiate the effect or interpretation of a peace treaty in case of doubt, can be applied. Yet the settlement of the said items, which "must await the conclusion of a treaty"¹⁴⁴ is now to be operated in accordance with the laws of peace and is accordingly precluded from any employment of force.¹⁴⁵

¹⁴³ British Secretary of State Mr. Morrison before the House of Commons (vol. 490 p. 40). An opposite view was expressed in the U.S. President's letter of July 9, 1951: cf. Scheuner ArchivVR 1951 p. 316.

¹⁴⁴ This formulation is contained in the proclamation of the South African Union of July 9, 1951 (No. 4654) which is entitled "Termination of the formal state of war between the Union of South Africa and Germany". The pattern of that declaration has been imitated by a large number of other states of the British Commonwealth. This proclamation considers the Allies' exercise of the supreme authority in Germany instead of the unconditional military surrender as the decisive criterion for the termination of hostilities with Germany.

"In the absence of treaty provisions, however, there may be legal obstacles to the continued vesting of German property, after the termination of the state of war, unless there are changes in our existing statutes. According to the terms of the Trading with the Enemy Act, many of its powers expire at the 'end of the war', a phrase which the act defines to mean the date of proclaiming the exchange of ratifications of a treaty of peace, or an earlier date fixed by Presidential proclamation. There is some doubt that the vesting powers of the Trading with the Enemy Act can be exercised after the termination of the state of war, unless expressly provided for in a new legislation." President Truman's letter of July 9th, 1951, in Scheuner ArchivVR 1951 p. 317.

With regard to these items which necessarily need a settlement by bilateral agreement Scheuner 1951 p. 321 makes the following observation: "Ein Friedensschluss im herkömmlichen Sinne, wie er am 10.2.1947 mit Italien, Finnland, und den Südoststaaten zustandekam, liegt nicht vor. Denn gerade die entscheidenden Punkte, die ein solcher Vertrag verbindlich festlegt, die territorialen Grenzziehungen, die politischen Klauseln (Bewaffnung, Staatsangehörigkeit, Wiederaufleben alter Staatsverträge), die Regelung der wirtschaftlichen und vermögensrechtlichen Beziehungen stehen noch offen. Auf diesem Felde bleibt es nach wie vor bei dem seit 1945 andauernden ungewöhnlichen Zustand des Fehlens fester rechtlicher Grundlagen. Sie werden nur auf einigen Gebieten (z.B. Abkommen über deutsche Vorkriegsschulden) allmählich durch spezielle Abmachungen ersetzt. Im übrigen füllen einseitige Festsetzungen und Provisorien und sogar Versuche der Schaffung eines fait accompli die Lücken."

¹⁴⁵ Cf. Lauterpacht BYB 1953 p. 233.

(3) The termination of a formal state of war by unilateral declaration abrogates the state of war only *inter partes*.¹⁴⁶

How many unilateral abrogations of the formal state of war are necessary in order to bring about a general termination of formal war with binding effect even for those parties which refused to commit themselves to any such declaration?¹⁴⁷ The question is particularly material with regard to Article 107 of the United Nations Charter. Under that Article nothing therein shall invalidate or preclude action in relation to any State which during the Second World War has been an enemy to any signatory to the Charter. The only limit on permitted action under Article 107 is that the action shall be "taken or authorized as a result of the Second World War". What is an action taken or authorized as a result of World War II? The representative of the United Kingdom declared that the sole object of Article 107 was

to leave the hands of the Allied Powers free as regards any action they might think it necessary to take in relation to one of the enemy States, either in the continuance of actual hostilities or as regards post-hostility action, such as the occupation of enemy territory, the enforcement of transfers of territory under a peace treaty, exacting reparations, and so on.¹⁴⁸

Although the preparatory documents to Article 107 show that it was not intended to limit the authority to what had been provided by

¹⁴⁶ A compilation of all the States which have been in a state of war with Germany during World War II can be found in Bundesanzeiger No. 193, October 6, 1950, and JahrbuchiaöR 1948 pp. 224 ff. and *ibid.* Annex.

The abrogation *inter partes* of a formal state of war by unilateral declaration has its parallels in other respects of international law. A state, for instance, which does not ratify a peace treaty, maintains *inter partes* the formal state of war while its ratifying co-belligerents abrogate the state of war. Another instance may be seen in the recognition of belligerency during a civil war. Any such recognition produces its effect only *inter partes*. See above p. 224.

¹⁴⁷ In preparatory studies dealing with the termination of World War II it was merely taken into consideration that "the state of war may be officially terminated at any time after *debellatio* by proclamation of the United Nations" (C.C. Shears, special assistant to the Attorney General of the United States, in a conference held on April 14, 1945 in Washington). Cf. Stuyt Ned. T.I.R. 1955 p. 4.

¹⁴⁸ The statement was made at the occurrence of the Berlin Blockade. Cf. Kelsen 1950 p. 808 n. 4 saying that Article 107 is not intended to apply to conflicts between Members of the United Nations, even if these conflicts are in some relation to former enemy states. See Wehberg RdC 1951/1 p. 82. Stone 1954 pp. 251/52 holds that "this vagueness of Article 107, incorporated by reference into Article 53 is somewhat increased by the enforcement power of regional arrangements "directed against renewal of aggressive policy" by any such State, there also reserved. The legitimacy of such pretended action against an enemy State will not therefore be easy to challenge in legal terms." Cf. also U. Scheuner: *Londoner Konferenz, Besatzungsstatut, Kriegszustand*. ArchivöR 1951 pp. 227 at p. 229.

armistice agreements or documents of unconditional surrender, it can be said that Article 107 becomes inapplicable to the extent that, owing to the complete restoration of the state of peace, no action could any longer be legally justified on the ground that it is taken *as a result of* World War II, i.e., in pursuance of the continuing of a formal state of war.

The sum-total of unilateral declarations made in 1951 by the Western Powers for the abrogation of the state of war with Germany was not sufficient to bring about a general restoration of peaceful relations between Germany and all its ex-enemies.¹⁴⁹ It was not until January 26, 1955, when the U.S.S.R. made a unilateral declaration of the same kind, that the general abrogation of the formal war with Germany was achieved.¹⁵⁰

¹⁴⁹ Cf. Scheuner ArchivöR 1951 p. 229. Kunz AJIL 1952 p. 118 observes with regard to the U.S. Congressional Resolution of 1951:

"It is therefore clear, that *if* a state of war continues with Germany under international law, the Congressional Resolution is *not* able to end it; the war *if* it continues, will not be ended between Western Germany and the Soviet Union and her satellites, nor between us and Eastern Germany. A Congressional Resolution "to terminate the war with Germany" will not apply to "Germany", but only to the Western fragment under our control, as the Presidential communication of 1951 makes perfectly clear. Now, what is the significance of the phrase "ending the war" under international law? It seems to this writer fundamental to distinguish between "ending the war" under international law and under some municipal law."

The Congressional Resolution under consideration had been made on October 19, 1951 wherein the Congress declared the state of war with Germany to be terminated on a date to be proclaimed by the President which was achieved five days later. Joint Resolution approved October 19, 1951, Pub. Law 181, 82nd Cong. and Dept. of State Bull., 25 (1951) p. 769; Proc. 2950 16 Fed. Reg. 10915.

Further unilateral declarations in the same sense had been made by Egypt on May 17, 1951; Italy and Mexico on July 7, 1951; Australia, New Zealand, and South Africa on July 9, 1951; the Netherlands on July 23, 1951; Peru on September 17, 1951. Brazil had already terminated the state of war with Germany by Decree No. 19950 of November 16, 1945.

¹⁵⁰ "Having in view the strengthening and extension of peaceful and friendly mutual relations between the Soviet Union and the German Democratic Republic, based on the recognition of the principles of sovereignty and equality, taking into consideration the opinion of the Government on the German Democratic Republic and taking into account the interests of the population of both east and west Germany, the Praesidium of the Supreme Soviet of the Soviet Union declares:

1. The state of war between the Soviet Union and Germany terminates and peaceful relations between them are being re-established.

2. All judicial restrictions occasioned by the war in respect of German citizens who were regarded as citizens of an enemy State are invalid.

3. The declaration on the end of the state of war with Germany does not alter her international obligations and does not affect rights and obligations of the Soviet Union which derive from existing international agreements of the four Powers concerning Germany as a whole." *The Times*, January 26, 1955 p. 8 col. 3.

Paragraph 4. The 'end of war' in legal instruments and with regard to neutrality.

1. The meaning of the phrase 'end of war' in treaties and conventions.

According to the concept of war in the formal and material senses, the expression 'end of war' may designate in a formal war either the cessation of hostilities or the termination of the formal state of war. It follows that the term 'end of war' in legal instruments may have different meanings. In municipal law a preliminary investigation is to be made whether the term 'end of war' refers to the concept of war in the material and formal senses as it is conceived by international law or whether it has a meaning of its own which is independently defined by municipal law.

A great many references to 'end of war' in municipal laws and private treaties which obviously refer to war as it is understood in international law may envisage either the end of war in the material sense or the termination of war in the formal sense. The exact meaning, if no particulars are furnished by the law itself, is to be derived from the context and the spirit of the document which considers the end of war.¹⁵¹

Commitments by political bodies at the end of war may equally refer to either of the meanings of 'end of war'. Unilateral declarations of States which decree the abrogation of war generally have "an excellent legal meaning in municipal law" although their constituting evidence of the end of war under international law holds good only *inter partes* or is even entirely immaterial. Not only Anglo-American courts but also Continental adjudication are bound to take into consideration that the question of the continuance of war, so far as it is a political question must be decided in accordance with the advice of the executive branch.¹⁵²

¹⁵¹ Domke ArchivVR 1955 p. 90:

"Das Kriegsende spielt auch in anderer Hinsicht eine rechtlich erhebliche Rolle. In manchen privatrechtlichen Vereinbarungen, z.B. in Pachtverträgen, ist das Kriegsende der Zeitpunkt, der für die Kündigung oder Aenderung von Zahlungsverbindlichkeiten festgelegt wurde... Hier ist die Auslegung der Willenserklärung entscheidend, nämlich ob mehr das tatsächliche Ende der Feindseligkeiten in Aussicht genommen war und nicht die nach öffentlichem Recht allein massgebliche formelle Beendigung des Kriegszustandes. Der ersteren Auslegung, als mehr den wirtschaftlichen Bedürfnissen entsprechend, ist in der Rechtsprechung der Vorzug gegeben worden. (Aehnlich oberster Gerichtshof Köln 8.8.1948, Oberster Gerichtshof in Zivilsachen, Bd. I, S. 133; Juristische Rundschau 1948 S. 218; Oberlandesgericht Nürnberg, 22.4.1949, Monatschrift für deutsches Recht, 1949 S. 420) Cf. Rumpf ArchivVR 1950 pp. 41/42.

¹⁵² Kunz AJIL 1952 p. 118: "Allied political declarations or court decisions since 1945 that the state of war continues with Germany are not necessarily a proof that this war continues under international law; their significance may be entirely restricted to the purposes of a concrete municipal law *in toto* or even to a particular legal situation or case in municipal law."

II. *The end of material war in the course of a state of war and its impact on the laws of war.*

The effective cessation of armed hostilities in the course of a formal state of war renders inapplicable all those laws of warfare which protect soldiers from being treated as criminals for acts such as killing or wounding enemies, destroying private property, carrying arms or other forbidden materials, etc. When material war was terminated in World War II by unconditional surrender, Mr. Churchill, in his address of May 8, 1945 specified the end of material war in the following declaration:

Hostilities will end officially at one minute after midnight tonight, Tuesday, the 8th of May ...

The Germans are still in places resisting the Russian troops, but should they continue to do so after midnight they will of course deprive themselves of the protection of the laws of war and will be attacked from all quarters by the allied troops.¹⁵³

Neutrality being essentially a reflection of war inasmuch as it only exists during war and since war conditions the rules of neutrality,¹⁵⁴ the termination of hostilities in a formal state of war equally abrogates a great many of the obligations which neutral States are bound to observe in a formal war.¹⁵⁵ As a rule it can be said, that all those laws of neutrality, which presume as *conditio sine qua non* the existence of material war, will lose their binding force from the moment that war in the material sense is terminated, no matter whether a formal state of war continues to exist or not.¹⁵⁶ Thus, Switzerland authorized the repatriation of the interned persons of the Allied forces as well as those of the Axis powers after Germany's unconditional surrender in 1945. No internment of military personnel, which had landed erroneously on her territory, took place from that date onwards.¹⁵⁷ On the other hand

¹⁵³ Quoted from Nurick and Barrett AJIL 1946 pp. 563 ff.

¹⁵⁴ Cf. Castrén 1954 p. 424 and ArchivVR 1955 p. 22.

¹⁵⁵ In the Spanish-American War of 1898 the armistice was signed on August 12, 1898, but the peace treaty was concluded only on December 10, 1898 in Paris. Several neutral States, however, admitted the ships of the formal belligerents in their ports for docking and their loading of foodstuffs.

¹⁵⁶ Termination of material war is understood in the sense that the resumption of hostilities is either impossible (as in the case of unconditional surrender) or extremely unlikely. An armistice agreement is not necessarily tantamount to the termination of material war. When after the Armistice Agreement of 1918 a part of the German forces at the western front retreated into Germany through Dutch territory, the Allied Powers protested to the effect that the state of war still continued.

¹⁵⁷ In the unpublished Act of the Federal Council of Switzerland of May 8, 1945 it was stated with regard to Article 11 of Hague Convention V of 1907 that it does not contain any

“stipulation relative à la fin de l'internement. Il est admis que celui-ci se terminera avec la paix, mais qu'un armistice entraînant la libération des personnes d'une partie délie l'Etat neutre de l'obligation de maintenir internés les militaires de ces mêmes pays. ...

Du fait de la capitulation de l'Allemagne, rien ne s'oppose à ce que tous

Switzerland claimed the cessation of seizure of contraband and above all the abrogation of its submission to the 'navy cert' system.

III. *Intermediacy between War and Neutrality?*

A status of intermediacy is not only maintained to be possible between war and peace in its true sense but also between neutrality and peace. Different consideration, however, has been given to this topic according to whether intermediacy is related to the beginning of war where it is termed *non-belligerency* or at the end of war.

Non-belligerency: The concept was tried to be developed at the beginning of World War II. Italy thought it expedient, for political reasons, to declare her non-belligerency on September 1, 1939 instead of proclaiming a state of neutrality. She was followed by Spain who made a similar declaration on June 12, 1940. It soon became evident that the proclamation of non-belligerency was intended to be a political formula which did not oppose the legal status of neutrality. With regard to the laws of the Paris Declaration of 1856 and Hague Convention XIII of 1907 the Italian government let it be understood in its protest note of March 4, 1940, to the British government that as far as the German coal export to Italy was concerned, it identified the state of non-belligerency with that of neutrality.¹⁵⁸

les militaires étrangers appartenant aux armées alliées qui se trouvent internés en Suisse soient libérés dès maintenant. Il en est de même des troupes italiennes entrées en Suisse lors de l'armistice italien pour échapper à la capture de l'armée allemande". Quoted from Guggenheim RdC 1952/I p. 177. Cf. Bindschedler, SJIR 1949 pp. 44 ff. who derives from this and similar facts that the law of neutrality is no longer to be applied. To a similar effect Friedmann: *The Allied Military Government of Germany*, 1947 pp. 64 ff. who, however, commits a grave mistake in drawing *e contrario* the conclusion (from the termination of neutrality at the end of material war) that no state of war could any longer continue to exist. Friedmann argued as follows:

"If the allies are still at war with Germany, this would normally mean that third states, such as Switzerland or Sweden, are neutrals and that the rules of belligerency apply in the relations between Germany and the allies. It is, however, obvious that the rules of neutrality are not and could not reasonably be applied to the present relations between third states and the former belligerents. Such matters as the duty of impartiality, the prohibition of loans to either belligerent, the liability to seizure of contraband goods — which now cover practically the entire range of commodities — the prohibition against neutral states supplying armaments to either belligerent, make no sense in the present situation. Nor could a state of belligerency be compatible with the agreement on the liquidation of German assets in Switzerland, made between the allies, by virtue of their supreme authority over Germany, and Switzerland." See Cmd. 6880.

¹⁵⁸ Cf. W. Grewe: *Der Status der Nichtkriegsführung*. ZADR 1940 p. 206. As to the development of non-belligerency as a new legal status *de lege ferenda* Castrén 1954 p. 451 remarks: "There ought to be no intermediate forms between belligerency and neutrality. It is a different matter that the duties of neutrality may be grossly neglected without this necessarily leading to war, since nature and extent of counteraction depends upon the belligerent States concerned. It may be quite possible that it prefers discriminatory treatment to involvement in open war against a new, powerful enemy."

Neutrality with regard to the continuation of a formal state of war: In this event the question of intermediacy is relative to the abrogation, integral or otherwise, of the status of neutrality after the termination of material war while a formal war continues to exist. While it is true that the obligations of neutrality generally end from the moment that the resumption of hostilities is impossible or unlikely, it must be conceded that the continuance of a formal state of war is not without effect on ex-neutral States.¹⁵⁹ Annexations and their legal consequences, for instance, will be expected to be ignored by ex-neutral States at least as long as the formal state of war continues to exist.¹⁶⁰

¹⁵⁹ Jennings BYB 1946 p. 124 points out that in providing for the representation of third States in Germany after 1945, the occupying Powers drew a sharp distinction between members of the United Nations, neutral States, and states at war with any of the occupying Powers.

¹⁶⁰ Equally, as long as certain diplomatic or judicial transactions presume the abrogation of a formal state of war, ex-neutral States remain bound by the rights and duties of neutrality. The transfer, for instance of State papers under custody, which are claimed by a succeeding government, could be effected only after the formal state of war has been abrogated either by peace treaty or by any other agreement to that effect.

CHAPTER VII

WAR UNDER THE CHARTER OF THE UNITED NATIONS

SECTION 1. THE CHARTER CONSTITUTES A CODIFICATION OF THE "JUS CONTRA BELLUM".

Paragraph 1. The law of the Charter and general international law.

The scope of the Charter in the province of international law is determined by the fact that it does not yet constitute general international law. Although Article 2 par. 6 of the Charter obliges non-member States to act in accordance with the "Principles of the United Nations so far as may be necessary for the maintenance of international peace and security", the possibility implied therein of raising the law of the Charter to the status of general international law has so far failed to be realized by State practice.¹

The character of the Charter as an antiwar agency is outlined in its preamble: "We, the Peoples of the United Nations determined to save succeeding generations from the scourge of war, which twice in our life-time has brought untold sorrow to mankind ... and for this end ... to ensure, by the acceptance of principles and the institution of methods that armed force shall not be used, save in the common interest ... have resolved to combine our efforts to accomplish these aims." With the exception of the preamble and Articles 53, 77 and 107 referring specifically to World War II, the Charter studiously avoids spelling the word *war*.

Article 1 of the Charter, which states the purposes of the United Nations, equally lays down the terminology necessary to render the suppression of war legally effective:

To maintain international peace and security, and to that end:
To take effective collective measures for the prevention and removal
of *threats to the peace*, and for the suppression of *acts of aggression*

¹ Cf. Tucker ILQ 1951 p. 26: "If the law of the Charter is considered as general international law then decisions of the Security Council create new international law binding upon members and non-members alike. But this interpretation of the Charter is quite doubtful. If the other interpretation is accepted — that the Charter does not constitute general international law — then decisions of the Security Council create new law only for members of the United Nations." Dehn, RepILA 1946 p. 39 rightly observes that "it is not a primary purpose of the United Nations Charter to establish an effective system of international law. Its primary purpose is to maintain international peace and security."

or other *breaches of peace*, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a *breach of the peace*.²

In calling the rules provided for the outlawry of war *law for the maintenance of peace*, the emphasis has been laid on the absolute nature of the Charter as far as it codifies a *jus contra bellum*. The outlawry of war is stipulated with regard to both formal and material wars. In order to achieve that goal, the Charter necessarily had to prohibit any unilateral act of force such as armed reprisals or intervention. The progress made in this respect with regard to the Covenant of the League of Nations is considerable.³ This can be seen in the wording of Article 2, par. 4 of the Charter which strictly prohibits any arbitrary use of force.⁴

Owing to the replacing of the term 'war' by the three phrases *act of aggression*, *breach of the peace* and *threat to the peace*, an adequate legal terminology has been established in order to give a legal form to the dual function of the Charter with regard to war: (1) Outlawry of war in the formal sense as well as in the material sense; (2) Providing the necessary legal ground for any international penal court which may in future be called upon to pronounce on the commitment of war as understood in international penal law.⁵

While the meaning of war under (1) refers to the concept of war in general international law, war under (2) may have a very different meaning to an international law court which applies international penal law.⁶ The phrases *act of aggression*, *breach of the peace* and *threat to the peace*, however, in replacing the term 'war' are meant to refer to both provinces of international law on the subject.

² Italics added.

³ Kunz, A/JL 1951 p. 533: "Experience had shown that the Covenant and the Kellogg Pact, because of the aura of uncertainty hovering around the legal concept of 'war', made it possible to wage 'wars in disguise'. Hence, the United Nations Charter, in making great progress from the point of view of legal technique, replaced the concept of 'war' by that of the 'threat or use of force'. The Charter, therefore, distinguishes between legal and illegal use of force; the distinction is again based on the legality, not on the intrinsic justice of the cause."

⁴ A proposal made by Brazil at the San Francisco Conference to prohibit under Article 2 par. 4 the use of economic weapons was refused. See Wehberg 1953 p. 69 who refers to UNCIO, Documents VI pp. 339, 340, 609. Colbert 1948 p. 203 thinks that "it is probably premature to assume even that the states signatory to the Charter by accepting it in general have agreed in particular that they no longer possess the right of retaliation."

⁵ See above pp. 105 ff. Cf. also Rumpf ArchivVR 1950 p. 44.

⁶ From this legal situation it can certainly not be derived what Pompe 1953 p. 35 expresses in the following terms: "But war is no longer a living concept in the practice of international law. In the Charter on the basis of which the nations have formally united the term is only used in relation to the past. For the maintenance of peace and order the concept of war has anyway lost its distinguishing function."

Paragraph 2. The prohibition of the use of force under Article 2 paragraph 4 of the Charter is comprised of formal and material wars.

According to Article 2 paragraph 4 all members of the United Nations "shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the Purposes of the United Nations".

The preparatory works which led up to the drafting of this Article give evidence that the prohibition of resort to armed force does not, as far as it admits exceptions, imply the need of preliminary authorization by the Security Council. An express proposal of the Norwegian commission that no resort to force should be made without the approval of the Security Council was rejected on the ground that the term 'approval' would introduce new uncertainties into the Charter as it might be interpreted either in the sense of posterior or anterior approval.⁷

The progress achieved in Article 2 paragraph 4 is due to the fact that this Article prohibits not only resort to war but also resort to force. Moreover it prohibits the threat to use force which no doubt includes any declaration of war. To that extent the problem of the legal interpretation of war under the Charter is no longer to be considered as distinct from the problem of the legal interpretation of acts of force falling short of war.⁸ As force and armed force are not identical the prophylactic character of Article 2 (4) for the suppression of war goes further than the prohibition of acts of aggression.⁹ Although an express obligation of the members of the U.N. to refrain from intervention in domestic affairs is not stipulated by the Charter such an obligation is certainly implied by Article 2 (4). Yet on the other hand the prohibition of force is also applied to a question which was originally within the exclusive competence of a State. Article 2 paragraph 7, as its final phrase shows, can in no way affect the implementation of coercive measures provided in Chapter VII.

It can be derived from the terminology of the Charter, in which the term 'war' does not occur, that so far as the prohibition of formal war is not self-explanatory, from the outlawry of aggression (which is use of

⁷ Cf. Wehberg 1953 p. 61: "Die Annahme des norwegischen Antrages hätte zur Folge haben können, dass die Abwendung von Gewalt im Falle der Selbstverteidigung eingeschränkt worden wäre, was aber nicht im Sinne des Unterausschusses war."

⁸ Cf. Calogeropoulos 1950 p. 78; Tucker ILQ 1951 p. 32.

⁹ Calogeropoulos 1950 p. 69 declares in this concern: "Il convient cependant de noter que le mot "force" est employé dans le sens de force armée, excluant la force économique ou autre, qui ne ferait point usage des forces matérielles." See references on this topic with regard to the Greek question before the Security Council in 1947.

armed force), all the constructive elements which constitute formal war are envisaged in the prohibition of 'threat of force' in Article 2 (4).¹⁰

Paragraph 3. Analysis of Chapter VII of the Charter.

The effectiveness of the Charter as a *jus contra bellum* has been assured by the prohibition of all 'acts of aggression'. Chapter VII of the Charter which deals with the enforcement measures to be taken in case of breach of the peace, was drafted on the assumption that (1) for practical purposes, a definition to cover every possible case of aggression was impossible and (2) the most satisfactory way of dealing with the problem was to give the Security Council full discretion in determining whether a threat to or a breach of the peace had in fact occurred.¹¹ Chapter VII is begun by Article 39 which stipulates as follows:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression, and shall make recommendations or decide what measures shall be taken in accordance with Articles 41 and 42 to maintain or restore international peace and security.

Whereas the final determination of *resort to war* under the League was left to the competence of its members, this has now been changed by the Charter. On the one hand the Security Council is bound *ex officio* to exercise its discretionary power which it holds for the determination of an act as 'breach of the peace'.¹² On the other hand no Member of the United Nations is entitled or bound to apply sanctions without

¹⁰ It is held that a State, in whose favour an international judicial decision has been made is prevented from using force against the State failing to comply with its international obligation and that the former may not even threaten the delinquent State with force, owing to Article 2 par. 4. See Tucker ILQ 1951 p. 26. Colbert 1948 p. 201 holds that "since peacetime retaliation, despite abuses, has served as a means of law enforcement, regulation of the methods employed rather than abandonment of the general principles might promote the observance of law in the international community." Cf. Fenwick AJIL 1945 p. 658.

¹¹ Cf. Bentwich-Martin: *A Commentary on the Charter of the United Nations*. 1950 p. 88; J.L. Briery: *The Covenant and the Charter*. BYB 1946 pp. 91/92; Dehn RepILA 1946 pp. 41 ff.

¹² Despite the fact that in Article 39 there is a duty imposed on the Security Council to determine the existence of any threat to peace, any breach to peace or any act of aggression, the Charter contains no rule that action shall always be taken against the combatant that must be regarded as the aggressor. A. Ross: *The Constitution of the United Nations*. 1950 p. 141 holds that "under Article 39 the Security Council need not decide on this question but may be satisfied with the decision that there is a 'breach of the peace'". For an opposite view Bentwich-Martin 1950 p. 90 according to whom the Council's "only escape is a temporary one, i.e., call upon the parties to comply with 'provisional measures' under Article 40. Whether or not that call is obeyed, the Council must, sooner or later, dispose of the matter either under Chapter VI or under Articles 41-42." See also Kelsen: *The Law of the United Nations*. 1950 p. 733.

previous positive decisions of the Security Council.¹³ So far the determination of a breach of peace in general and of an act of aggression in particular has become a matter of procedure under the Charter.¹⁴

As to the material aspect of Article 39, the determination of a threat to or breach of the peace has a prophylactic character with regard to the outbreak of war. It follows that in the event of the Council pronouncing on the existence of a breach of the peace this does not mean *ipso jure* that a war has broken out.¹⁵ The Security Council, when considering whether a breach of the peace has been committed in a specific case, is not bound in its finding by the criteria leading up to the existence of war.¹⁶ Moreover it must be borne in mind that *de facto* act of aggression must be recognized by the Council before it becomes material under the Charter. This will be possible only if there is harmony among the permanent members of the Security Council.¹⁷

Article 41 provides in part for the specific exercise of the authority conferred upon the Security Council under Article 39. It states:

The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial

¹³ An exception to this principle is the 'inherent' right of self-defence which Members have under Article 51 of the Charter. Cf. Dehn Rep. ILA 1946 p. 42; Colbert 1948 p. 202.

¹⁴ Tucker ILQ 1951 p. 26: "The possibility is not excluded therefore that the Security Council may, in a given instance, take measures not against the State which violates international law but, on the contrary, against a State acting in accordance with the law. Against this it may be argued that according to the law of the Charter a State violates its obligations once the Council has decided that its actions constitute a threat to, or breach of, the peace." Cf. Pompe 1953 p. 51.

¹⁵ Ross 1950 p. 146: "In order to establish a breach of the peace or an act of aggression it cannot be necessary that there has been open military fighting. If, for instance, a great power occupied a small country which owing to inequality of strength does not resist, such a violation is also a breach of the peace." Cf. McDougal AJIL 1955 p. 66.

¹⁶ Pompe 1953 remarks with regard to the term 'aggression' that "the military element, — the *nucleus* of the concept of aggression — has been completely lost here and the term has begun to indicate all sorts of interstate acts, prohibited by international law, by *comitas* or by international morality from which a State suffers some prejudice in one field or another". That author refers to the General Assembly Resolution 380 (V) of November 17, 1950 *Peace through Deeds* which speaks of "aggression whether committed openly, or by fomenting civil strife in the interest of a foreign Power or otherwise".

¹⁷ Bentwich-Martin 1950 p. 89: "Whether an act of aggression has been committed and whether sanctions ought to be taken are questions on 'substance', which require the concurrence of all permanent Members in accordance with Article 27 (3) ... It follows that a permanent Member which has committed or is about to commit aggression, or is in league with the aggressor, can lawfully use its right of veto, it can stop the Council from finding that there has been a threat to the peace, a breach of the peace or an act of aggression. Here, precisely, lies one of the fundamental weaknesses of the Charter."

interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

It is to be noted, that under this Article the Council is expressly given the discretionary power to decide what measures "do not involve the use of armed force". Can a member of the United Nations, being accused of resort to armed force, invoke as a justification of its action a precedent where the Security Council under Article 41 had dealt with the same action as of not "involving the use of armed force"? Even if the Anglo-Saxon principle of *stare decisis* were admitted in international law, it does not seem likely that the Security Council would be bound by it.¹⁸

SECTION 2. THE CHARTER AND THE LAW OF WAR.

Paragraph 1. The implementation of the "jus contra bellum" by an antiwar agency does not preclude the Laws of War from existing.

A treaty establishing an antiwar agency may rest on rules of law on peace and thereby avoid the controversial word 'war', but it cannot avoid the notion of war.¹⁹ Although an examination of the principal provisions of the Charter directly dealing with enforcement action shows that the Security Council is not necessarily bound to act in accordance with international law, this does not mean that the general principles of international law are reduced to a 'platonic' significance. The United Nations being led by political considerations, any attempt of construing a notion of war out of the text or the practice of the Charter is necessarily doomed to failure. With or without knowledge of the preparatory works of the Charter, it will remain a fact that apart

¹⁸ Tucker 1951 p. 25 remarks with regard to the discretionary power of the Security Council: "The Charter prohibits the Members from the 'threat or use of force' in their international relations, but it allows the Security Council to take enforcement action if it decides upon the existence of 'a threat to the peace, or breach of the peace'. The two provisions obviously can be interpreted to mean different things. Again, this will depend upon the Security Council.

To say that all this constitutes an attempt to interpret the Charter in a manner the framers did not intend to convey, that the framers, although giving the Security Council a great deal of power, intended that they use this power within the boundaries of existing law, is evidently not true. For it is a well-known fact, which may readily be found from almost any authoritative interpretation of the Charter, that an underlying political idea supported by those Powers chiefly instrumental in creating the Charter was the conferring of unlimited discretion upon the Security Council; and this political idea was clearly realised in the Charter's provision."

For a study on the relevance of '*stare decisis*' in international law cf. P. Berger: *Bindung an Präjudizien?* Österreichische Zeitschrift für öffentliches Recht 1954 pp. 303 ff. at p. 319.

¹⁹ Grob 1949 p. 326.

from its function as an antiwar agency, the Charter does not deal with any of the legal aspects of the existence of war.²⁰

The coexistence of both the Charter and the laws of war is not only compatible with but even imperative for the bettering of international relations as long as humanity refuses to think in terms of a centralized World State. It is fallacious to think that there is only the alternative of either forbidding the resort to force or not forbidding and regulating it.²¹ The question, therefore, is not "What is the concept of war under the Charter?" but "How must the Charter be interpreted in the light of the laws of war?"²²

Paragraph 2. The Charter as "lex posterior" of the Third Hague Convention, the League of Nations and the Pact of Paris.

An examination of the Charter in the light of the law of war is to be effected differently with regard to (1) the *jus contra bellum*; (2) the *jus in bello*. As there is nothing illogical in trying to eliminate war and yet to regulate its conduct, investigation is also to be made on the inter-relationship between these two branches under the Charter.

For the Hague Convention III of 1907 which fulfilled the dual function of codifying a *jus bellum ac pacis* and of setting up rules of warfare with regard to the initiation of war, the impact of the Charter is twofold: The Hague Convention III is definitely abrogated by the Charter inasmuch as the former codified a *jus bellum ac pacis*.²³ Regarded as a rule of warfare (*jus in bello*) there is much authority to say the Hague Convention III, although not directly conflicting with the Charter, is substantially obsolete.

Undoubtedly, situations are possible in which one Member of the United Nations may be lawfully engaged in hostilities against another Member, as, for instance, in the case of self-defence or in the course of the collective enforcement of the Charter. However, in the first case, which in accordance with Article 51 of the Charter, can legitim-

²⁰ Grob 1949 p. 327 starts out from the assumption that a *threat of war* exists if international peace and security need to be maintained and that likewise *war* exists if international peace and security need to be restored. There-upon he reaches the conclusion that "the words 'breach of the peace, or act of aggression', therefore, simply paraphrase the expression 'recourse to war' just as the expression 'threat to the peace' paraphrases the expression 'threat of war'."

²¹ Pompe 1953 p. 18 holding an opposite view, offers the opinion that "even a relative concept of war not dependent on the intention of the conflicting parties but on the declarations of outsiders, primarily on those of the organ of the community of States for the maintenance of collective security, seems no longer to have a place in the most recent developments and in the framework of the United Nations. The concept of war seems to have disappeared from the practice of international law."

²² Cf. W.J. Bivans: *Re-statement of the laws of war applied to the armed forces of collective security arrangements*. AJIL 1954 pp. 140 ff. at p. 141: "Actually the outlawry of war and the law of war are not self-contradictory, but are entirely consistent one with the other."

²³ Cf. Merle 1949 p. 152; see also Eagleton AJIL 1938 p. 35.

ately materialise only as the result of an armed attack, there is hardly room for an ultimatum. In the second case, the ultimatum will be replaced by the numerous warnings and resolutions preceding the enforcement action under Chapter VII of the Charter...

A Member of the United Nations determined to violate the Charter by an unlawful recourse to war might wish nevertheless to comply with its obligations under the Hague Convention in the matter of ultimatum — although it is not easy to fathom the reason for such punctiliousness which is essentially procedural in nature, accompanying the breach of a fundamental obligation. Similar considerations apply to the obligation, somewhat nominal, of Article 1 of Convention No. III in the matter of a declaration of war.²⁴

Paragraph 3. Wars under and outside the Charter.

I. Illegal wars of aggression.

Armed measures of sanctions undertaken under the Charter against acts of aggression may cover the following different situations:

The Security Council, in 'ideal' accordance with the laws of the Charter, determines that an act of aggression or breach of the peace has taken place and thereafter sets into motion the military forces of the United Nations in order to proceed by armed collective action against the law-breaker. This event was expected by the framers of the Charter to be the ordinary way of proceeding against the law-breaker as a last resort. Any such hostilities, which legally would have the genuine characteristics of a war of sanction, came to be qualified in legal theory as 'police action' of the United Nations organisation.²⁵

A quite different situation arises where the Security Council, owing to the veto of one of its permanent Members, is unable to qualify an act of armed force on the part of one of its members as an 'act of aggression in the spirit of the Charter'. The attacked State at any rate will be entitled to react by armed force against the invader and third States will claim that they are free to give assistance to whom they consider on their own discretion to be the aggrieved party.²⁶

Finally, account must be taken of all the situations which have

²⁴ Oppenheim-Lauterpacht IntL 1952 p. 297, see also Eagleton AJIL 1938 p. 35, Spaight 1947 p. 74.

²⁵ See below p. 290.

²⁶ "In the event of the Security Council failing to take any action or if such action as it does take is clearly inadequate the right of self-defence could be invoked by any member or group of members as justifying any action they thought fit to take." Official Commentary on the Charter issued by H.M. Government, Cd. 6666 quoted from Dehn, RepILA 1946 p. 44. This official British comment considers rather the case where the Security Council did qualify an act of armed force as 'act of aggression' but did not require its members in the following to carry out any military enforcement measures under Articles 41, 42, or 43 of the Charter. There is much ground for the proposition that the comment of H.M. Government can be invoked by analogy in the event that owing to the veto of one of its members, the Security Council did not even qualify an act of armed force as 'act of aggression'.

arisen since the existence of the United Nations and which in fact do not include either of the two above-mentioned situations. In the absence of an effective function of the Security Council

the ensuing hostilities may take the form of collective action of a sort, backed by the overwhelming consensus of opinion as to who in fact is the aggressor. This would have been the situation in relation to the hostilities in Korea in the years 1950-53 but for the fact (which must be considered as exceptional) that the abstention of Soviet Russia from the deliberations of the Security at a crucial juncture made possible decisions of that body...

The same applied to the situation arising from collective action undertaken in pursuance of a recommendation, which is not binding, of the General Assembly made in pursuance of the 'Uniting for peace' Resolution adopted by it in 1950 — a Resolution the legal nature and effect of which are controversial. There is no warrant in the Charter for considering the designation of the aggressor by virtue of a Resolution of the General Assembly, and the resulting illegality on his part, as legally binding upon States which have not voted for the Resolution. It is doubtful therefore whether there exists in such cases a fully valid finding of the existence of an 'illegal war' with such controversial consequences as may follow therefore.²⁷

It appears that while the 'ideal' police action under the Charter, i.e., military enforcement measures under Articles 39, 42, and 43 has not found so far its realisation, the international conflict which is charitably called "accidental war" and which constitutes legally an exception to the spirit of the Charter has become rather the normal phenomenon in practice.²⁸ This is evidenced by the two resolutions 'Uniting for Peace' and 'Duties of States in the event of the outbreak of hostilities' the latter of which provides for the case in which "a State becomes engaged in armed conflict with another State or States".²⁹ It goes without saying

²⁷ Lauterpacht: *The Limits of the Operation of the Laws of War*. BYB 1953 p. 207. Cf. Kelsen: *Tendances récentes du droit des Nations Unies*. Revue Internationale d'Histoire Politique et Constitutionnelle 1952 pp. 34 ff.; Wright, AS Proceedings 1951 pp. 170/71; Stone 1954 p. 233; Kunz 1951 p. 55.

²⁸ Pompe 1953 p. 41 observes that "in the records of the ... United Nations the principal role appears to be attributed to "the type of war which is charitably called accidental war, the war which is the 'inevitable' result of a 'regrettable' incident", and not the intended result of a policy." Lauterpacht BYB 1953 p. 220. "For it must be assumed that where there has been a valid determination of aggression by an appropriate vote, including that of the permanent members of the Security Council, then as a rule, the force at the disposal of the United Nations will be so overwhelming as to approach rapid police action permitting of no prolonged or serious resistance."

²⁹ Resolutions 377 (V) of November 3, 1950 and 378 (V) of November 17, 1950. The latter resolution imposes upon the State engaged in an armed conflict with another State the duty to proclaim immediately its readiness, on the condition of reciprocity, to cease fire and to withdraw all its military forces. It can be said that this resolution recalls the undifferentiated concept of war in the traditional sense where no regard is paid to the causes and the origin of the armed conflict. Cf. Pompe 1953 p. 42.

that any attempt to clothe these 'accidental wars' with the mantle of a 'war of sanction' must rest upon the interpretation that the resistance of the State illegally attacked and the military help offered to the attacked State by third States can technically serve as a sanction.³⁰

II. *The inherent right of self-defence.*

The fact of the existence of war is no doubt "a matter unrelated to the question concerning the propriety of the mode by which it is brought about". Under the Charter material war can be brought about either by collective action of the U.N. military forces against the law breaker or by military defence of the State invaded. The latter contingency is expressly guaranteed to all members of the United Nations as an inherent right of self-defence and laid down as such in Article 51 of the Charter.³¹ Any member of the U. N. which claims to act in self-defence implicitly makes two statements: one of fact and one of law. On the one hand it admits its engagement in material war, on the other hand it claims to wage legitimate war.

The right of self-defence as stipulated in Article 51 must be regarded in a narrower sense than the general concept of self-defence under customary international law.³² While the latter is valid against 'imminent attack', the right of self-defence under Article 51 of the Charter only obtains "if an armed attack occurs against a member of the United Nations".³³ States which are members of the United Nations have renounced their broader right of self-defence which they enjoyed under customary international law.

Article 51 allows expressly for the so-called 'collective self-defence'. This term is not very accurate for the right conferred upon the members of the U.N. by this phrase is a right to go to the assistance of a State

³⁰ Cf. Tucker ILQ 1951 p. 11.

³¹ Whether Article 51 is in the nature of a reservation rather than a grant remains doubtful. Tucker 1951 p. 29 points out that Article 51 was not inserted in the Charter "in order to provide a ready alternative to the collective enforcement actions provided under Articles 39, 41, 42. The insertion was by way of an exception". Cf. Stone 1954 p. 244.

³² Cf. Kunz AJIL 1951 p. 53. For preliminary discussions to the insertion of Article 51 in the Charter see Goodrich-Hambro: *The Charter of the United Nations*. 1946 pp. 174 ff.; Dehn RepLA 1946 p. 42; Kelsen 1950 pp. 791 ff.; Calogeropoulos 1950 pp. 89 ff.; Stone 1954 pp. 243 ff.

³³ What constitutes an 'armed attack' is not at all self-evident. While it is obvious that Article 51 prohibits 'preventive war', the strategic implications of the word 'attack' for the purpose of the Charter may admit of self-defence against armed attack which is not invasion. Cf. Kunz: *Individual and Collective Self-defence in Article 51 of the Charter of the United Nations*. AJIL 1947 p. 878; Tucker ILQ 1951 pp. 29/30; P.B. Potter: *Preventive War critically considered*. AJIL 1951 pp. 142 ff., p. 144. Frankenstein 1952 p. 42 states that "les limites de cette défense légitime sont strictement posées par la coutume et par la loi. Une fois l'agression neutralisée et le *statu quo* rétabli, la légitime défense cesse de jouer. Au vu du code pénal, quiconque poursuivant un agresseur en fuite jusque dans sa demeure, l'attaquerait à son tour, ne le ferait plus en état de légitime défense."

acting in self-defence.³⁴ The right of 'collective self-defence' was inserted in Article 51 in order to bring certain regional arrangements into conformity with the Charter. States remain free to make use of their right of 'collective self-defence' at their own discretion; useless to say that thereby the right of 'collective self-defence' comes very close to the pre-existent customary liberty to go to war.³⁵

III. *The legal position of the U.N. with regard to civil wars.*

The Charter of the United Nations expressly prohibits in its Article 2 paragraph 7 intervention in matters which are essentially within the domestic affairs of a State. It has been maintained that as a consequence of this Article the parties to an armed conflict in relation to and in the meaning of Article 39 of the Charter must be States, and only States. The assertion that the Security Council is not entitled to deal with civil wars is argued on this ground in corroboration of which Article 1 paragraph 1 is referred to saying that the purpose of the United Nations is to maintain *international* peace and security.³⁶

As civil wars in the era of 'ideological wars' do not necessarily manifest themselves as armed conflicts belonging to the domestic affairs of a State, the concept of civil war is no longer a sufficient ground for leaving its settlement to the parent State concerned. Although it is true that the prohibition of resort to armed force under Article 2 par. 4

³⁴ Kunz AJIL 1947 p. 875 saying that the term 'collective self-defence' is not a happy one, invokes the term used by Descamps (RdC 1930/I pp. 469 ff.) who speaks of the "conours à la légitime défense". Collective self-defence corresponds, in municipal law, not to self-defence, but to the defence of others, i.e., to the German *Nothilfe* which is distinguished from *Notwehr*. Cf. Wehberg 1953 p. 47.

³⁵ The express recognition of individual and collective self-defence gives rise in the province of law to similar difficulties encountered in any effort to define aggression which may be regarded as the same question "approached from the other side". Schwarzenberger AJIL 1943 p. 476; see also Wehberg FW 1938 p. 139. The consequences of inserting Article 51 in the Charter will be felt so much the more as the breakdown of the political unanimity of the Security Council has shifted the emphasis from Article 39 to Article 51 of the Charter, "a shift which represents little save the abandonment of an unworkable centralised system of collective security for one which is decentralised." Tucker ILQ 1951 pp. 28/29. Jessup Acta Scandinavia 1953 p. 23 remarks with regard to self-defence that "if such action is 'war', then one must conclude that such a war is legal under the Charter. It is probable that the tendency will be to consider such action as legally in the same category as action by the Security Council itself. Articles 51 and 53 would support such an interpretation." Cf. Pompe 1953 p. 37.

Yet practice has evidenced that even in the event that the community of collective security is able to take the necessary measures in order to maintain international peace, very rapidly fighting might go on for some time in which both parties claim to act in legitimate self-defence. Cf. Kunz AJIL 1951 p. 54. In a transitional period where a member of the U.N. is unable to recognize which of the two belligerent nations claiming to act in legitimate self-defence is using unauthorized and therefore unlawful armed force, it is difficult to see why in such a case the old legal equality of the belligerents would not exist and that neither would there be any place for traditional neutrality. See Pompe 1953 p. 37; Dehn RepILA 1946 p. 44.

³⁶ Cf. Grob 1949 p. 329.

does not concern the initiation of civil war, its continuation will become relevant for the purpose of the Charter from the moment that the hostilities represent a danger for international peace.³⁷ In any such event, the Security Council is entitled to apply the machinery of the United Nations for a settlement of civil wars even if the State involved should oppose any such intervention.³⁸

The same is *a fortiori* true for material wars where no authoritative statement is possible as to whether they constitute a civil war or international war. This might be due either to the different conceptions which Communist States and non-Communist States have of civil wars³⁹ or to division of States where the legal status of their parts cannot be evaluated in classical terms.⁴⁰ At any rate it can easily be seen from

³⁷ "The dangers which confront us take more than one form, and the danger area is nothing less than the whole world. A minor war, or even a civil war, may begin anywhere, and a breach of the peace which appears to be of purely local importance may develop into a world-wide conflict. The menace of war continues for so long as there is no real peace. Our problem is not so much to preserve peace as to make it." Smith World Affairs 1955 pp. 231/32.

³⁸ Kelsen 1950 p. 19 observes that "a civil war, as any other situation within a state, may be interpreted by the competent organ of the United Nations as a threat to international peace, in which case intervention on the part of the Organization is not prohibited according to the express provision of Article 2, paragraph 7. Hence it is doubtful whether the restriction implied in the term 'international' peace is of any importance." Cf. Pompe 1953 p. 15 who points out with regard to the reservation in Article 2 par. 7 that this provision "enabled the United Nations General Assembly to deal with the Greek guerrilla war and to investigate the situation through a special committee without previously determining whether the insurgents were assisted by foreign States. Once the fact of this foreign assistance was established, the conduct of these States did not need to be qualified in terms of peace and war to justify orders being given to them." General Assembly Resolution 109 (II) of October 21, 1947.

Wehberg 1953 p. 74 raises the question of whether or not a colonial insurrection may be regarded, if it develops into regular warfare, as an 'international' war. That author answers the question in the negative. From the standpoint of the Charter, however, a colonial war which constitutes a threat to or a breach of international peace may be subject to a decision of the competent organ of the United Nations. In the event that enforcement measures in an original colonial insurrection are taken under Chapter VII a colonial war will certainly constitute an international war because of having broken *international* peace. Cf. Guggenheim, Lehrbuch II p. 732: "Auf jeden Fall stellen die folgenden Tatbestände eine 'potentielle' Bedrohung des Völkerfriedens dar: 'Die Hilfe an bewaffnete Banden', die landesrechtlichen Friedensstörungen und Friedensbedrohungen mit zwischenstaatlichen Rückwirkungen." See Castrén 1954 p. 433 and ArchivVR 1955 p. 28.

³⁹ See above pp. 68 ff.

⁴⁰ When Mr. Gromyko during the Korean conflict invoked Article 2 paragraph 7 in order to represent the armed conflict as being a civil war falling within the purview of domestic affairs, the United Nations refused to enter into a legal controversy on the subject-matter. Frankenstein, 1952 p. 43 opposes the assertion that the Korean War could be regarded as a civil war "car la Corée du Nord comme la Corée du Sud, s'ils n'étaient pas aux yeux de tout le monde des Etats de jure, étaient néanmoins tous les deux des Etats de facto, avec leurs territoires, leurs populations et leurs autorités." Cf. Pompe 1953 pp. 17/18.

the practice of the United Nations that it paid little attention to all these and similar legal technicalities and was exclusively determined by the question whether or not an armed conflict constituted a threat to peace.⁴¹

IV. *The practice of the United Nations with regard to material wars.*

A. The war between the Netherlands and Indonesia in 1947.⁴²

The first case brought before the Security Council under Chapter VII of the Charters was the armed conflict between the Netherlands and Indonesia which took the shape of material war at the end of World War II when the Dutch government proceeded in re-establishing colonial administration in this part of its colonial empire. The character of this war in 1947 could be termed civil war or colonial war just as well as war of independence or even international war.⁴³

In a letter dated July 30, 1947, to the Secretary General, the representative of Australia, at this time member of the Security Council, states that "the Australian Government considers that these hostilities constitute a breach of the peace under Article 39 and urges that the Council take immediate action to restore International Peace and Security".⁴⁴ The case was equally brought before the Security Council by the Government of India under Article 35 par. 1 of the Charter.⁴⁵

At the 171st meeting of the Security Council the representative of Australia proposed the following resolution:

The Security Council,

Noting with concern the hostilities in progress between the armed forces of Netherlands and of the Republic of Indonesia and

Having determined that such hostilities constitute a breach of the peace under Article 39 of the Charter of the United Nations.

Calls upon the Governments of the Netherlands and of the Republic of Indonesia, under Article 40 of the Charter of the United Nations, to comply with the following measures, such measures to be without prejudice to the rights, claims, or position of either party:

⁴¹ When the Formosa conflict developed into armed hostilities Communist China was invited on February 2, 1955 to appear before the Security Council. But she refused on February 4, holding the conflict as a being in the nature of a domestic affair.

⁴² Kelsen: *The Law of the United Nations* 1950 pp. 438 ff., ArchivVR 1950 pp. 63 ff.

⁴³ A number of States including India, Australia, Egypt, Transjordan, had recognized the Republic of Indonesia and it was arguable that Holland herself had done so under the Cheribon Agreement. Cf. Stone 1954 p. 257 No. 64. The representative of the United Kingdom declared later on "that so far we have not heard any really convincing arguments to persuade us that this is a war between two sovereign States".

⁴⁴ Doc. S/449.

⁴⁵ Here and in the following cases the definition of 'international peace' was involved, and not that of 'international war', "but the claims presuppose an identity of the two questions". Stone 1954 p. 306 No. 47. Cf. Guggenheim, *Traité II* 1954 p. 252 n. 1.

(a) to cease hostilities forthwith, and (b) to settle their disputes by arbitration in accordance with Article 17 of the Linggadjati Agreement, signed at Batavia on March 25, 1947. (Official Records of the Security Council, 2nd Year, No. 67, p. 1626.)

The representative of the Netherlands denied the competence of the Security Council, arguing that there was no threat to, or breach of, international peace, since there was no conflict between two sovereign States, Indonesia not being a sovereign State, and that the situation was a matter essentially within the domestic jurisdiction of the Netherlands. In pursuance of which assertion the Netherlands made it clear that

the sovereign Power ... is the Netherlands, whose Government has difficulties with one of its constituent elements, not an external element. We therefore contend: First, the Charter is not applicable to what is now happening in Java and Sumatra; and Secondly, that while it seems to us that contention is adequate to rule out action of any, including an affirmative vote on the Australian draft resolution now before us, we consider, in addition, that this is a matter essentially within the domestic jurisdiction of the Netherlands.⁴⁶

The representative of China retorted to the plea of domestic jurisdiction with the following argument:

In discussing a question of this type, if we pay too much attention to legalities, we shall become involved. ...

What does this legality involve? It is said that the Council has no competence because there is no threat to international peace, as this is not international war. What is it? It is colonial war. What then are you upholding? You are upholding the freedom to wage colonial war as you please. You say that when a colonial war is being waged, this Council has no right to interfere. Legally you may be right, but that kind of legality does not go far. It may create more troubles and more problems in this world.⁴⁷

At its 173rd meeting on August 1, 1947, the Security Council adopted the resolution proposed by Australia and amended by the United States and Poland. In doing so, the Security Council declared itself competent to intervene in the conflict between the Netherlands and Indonesia, although

⁴⁶ Official Records of the Security Council, 2nd Year, No. 67 p. 1645. Doubts about the competence of the Security Council were expressed by the delegates of Belgium, the United Kingdom and France. The representative of the United States submitted an amendment to the Australian resolution to eliminate from its text the invocation of Articles 39 and 40 which raises "very complex and serious questions of law". The amendment reads as follows: "The Security Council, Noting with concern the hostilities in progress between the armed forces of the Netherlands and of the Republic of Indonesia, Calls upon the parties, (a) to cease hostilities forthwith, and (b) to settle their disputes by arbitration or by other peaceful means."

⁴⁷ Cf. Kelsen 1950 p. 441 n. 9.

it did not make an express statement about its competence and did not indicate the Articles of the Charter under which it was acting.⁴⁸ In spite of the elimination of any reference to Article 39 and 40 of the Charter from the text of the resolution, the delegate of Australia after its adoption declared that the Security Council was examining the case under the Articles of Chapter VII.⁴⁹

On August 26, 1947, the Security Council adopted a resolution according to which

The Security Council

Taking into consideration that military operations are being continued on the territory of the Indonesia Republic:

(1) Reminds the Government of the Netherlands and the Government of the Indonesian Republic of its resolution of August 1, 1947, concerning the 'cease fire order' and peaceful settlement of their dispute;

(2) Calls upon the Government of the Netherlands and the Government of the Indonesian Republic to adhere strictly to the recommendation of the Security Council of August 1, 1947.⁵⁰

B. The Israelo-Arab war in Palestine.⁵¹

The increasing armed hostilities after the end of World War II which took place in Palestine between Israelis and Arabs, determined the General Assembly in 1947 to act under Article 14 of the Charter in order to settle the conflict by the authoritative intervention of the United Nations. Palestine was at that time still under the exclusive administration of the United Kingdom. On November 29, 1947, the General Assembly adopted at its 128th meeting a resolution regarding the future government of Palestine as well as the settlement of the armed hostilities. Therein it was requested that

i...

⁴⁸ The representative of the United Kingdom observed that "in the view of my delegation, the resolution before us, even as it is re-drafted by the United States' delegation, does not avoid entirely the difficulty to which I have referred. It does, on the contrary, prejudice the legal position, because to call on parties to cease fighting is definitely to imply that Article 2, par. 7, of the Charter does not apply." Official Records of the Security Council, 2nd Year No. 68 p. 1674.

⁴⁹ *Ibid.* p. 1708. The representative of Poland said at the 185th meeting of the Security Council that by admitting the case under Article 39 of the Charter, the Security Council "recognized the competence of the Security Council to deal with the case. Although the resolution did not expressly mention Article 39, it is quite clear that under this Article and only under this Article, the case can be dealt with here and measures provided by the Charter can be applied."

⁵⁰ Doc. S/521.

⁵¹ For a legal survey see ArchivVR 1950 pp. 59 ff. S. Rosenne: *Israel's Armistice Agreement with the Arab States*. 1951; cf. Kelsen 1950 pp. 195 ff., 286 ff.

(c) The Security Council determine as a threat to the peace, breach of the peace or act of aggression, in accordance with Article 39 of the Charter, any attempt to alter by force the settlement envisaged by the resolution.⁵²

In recommending to the Security Council to decide whether the situation in Palestine constitutes a threat to the peace and in the case the Council adopted such decision, to take the measure provided for in Articles 39 and 41, The General Assembly recommended nothing that was not within the competence of the Security Council. The same is true with respect to the recommendation to determine as a threat to the peace, breach of the peace or act of aggression any attempt to alter by force the settlement envisaged by the resolution of the General Assembly.⁵³

A plea based on the 'domestic jurisdiction clause' was made by the representative of Lebanon against the competence of the Security Council in this matter. The argument was advanced that the Palestine question did not constitute any threat to international peace because the situation in Palestine interested and concerned only Palestine herself.⁵⁴

By May 15, 1948, when Israel acquired its independence as a sovereign State, the armed hostilities between Israelis and Arabs developed into a full-fledged war.⁵⁵ In view of this fact the Security

⁵² Doc. A/519 p. 132.

⁵³ Kelsen 1950 p. 288 n. 1.

⁵⁴ Official Records 3rd Year 267 meeting pp. 81/82: "We can no longer agree ... that the internal situation in Palestine may be considered as a threat to international peace calling for intervention if the need should arise, on the part of the Security Council. First of all, this threat to international peace does not exist, or exists only in the minds of those who wish it to be so. Secondly, the situation in Palestine concerns Palestine alone. That Palestine is mandated country in no way alters the facts of the problem.

Under Article 22 of the Covenant of the League of Nations, the juridical status of Palestine is that of an independent country the independence of which, is nevertheless, subject to the advice and assistance of a Mandatory Power. ... When the Mandate ends on 15 May, Palestine will automatically become a sovereign State, independent even of any subsequent recognition of its independence and regardless of whether or not it is a Member of the United Nations." Kelsen 1950 p. 288 remarks that any such assertion is without foundation in the Charter, and that the interpretation suggested by the U.S. was correct. The representative of the United States had declared at the 253rd meeting of the Security Council, that under the Charter the Council was authorised to remove a threat to international peace, whether it arose from outside or inside Palestine.

⁵⁵ On that date, the Arab States' armies entered Palestine in order to 'restore peace and order'. The invasion of the Egyptian armed forces into Palestine was denied by the Egyptian government to constitute an aggression because the "object was not the desire to fight or realize any material gain." Cf. *Revue Egyptienne de Droit International* 1949 pp. 79 ff. On January 7, 1949, Egypt issued a *communiqué* which restated the facts that "the struggle continued about eight months ... During the struggle the Security Council interfered more than once to impose armistice. It issued its well known decisions of May 29, July 15, and August 18 ... On November 4, November 16, and December 29, the Security Council issued a cease-fire

Council adopted a resolution on July 15, 1948, which declared "that the situation in Palestine constitutes a threat to the peace within the meaning of Article 39 of the Charter".⁵⁶

C. The dispute between Hyderabad and India.⁵⁷

Hyderabad, not a member of the United Nations, addressed a cablegram to the President of the Security Council on August 21, 1948, which read as follows:

The Government of Hyderabad, in reliance on Article 35 (2) of the Charter of the United Nations, requests you to bring to the attention of the Security Council the grave dispute which has arisen between

order and the return to the situation which existed before the last Zionist attack on October 14."

The Egyptian government had established a regular prize court, but any extension of its blockade with effect upon third powers was vigorously refused by the major powers. The question as to whether the war in Palestine developed from material war into a general state of war after the recognition of the Israelian State by the United States and the Soviet Union must be answered in the negative. This does not oppose the fact that some third States created a formal state of war *inter partes* by proceeding to a recognition of belligerency. Cf. *Arab Bank Ltd. v. Barclays Bank Dominion, Colonial and Overseas*, 2 All E.R. 263 (1953) (reprinted in BYB 1953 pp. 515/17). In this case the continuance of material war was presumed even after the armistice concluded on April 5, 1949. Certain legal effects of a state of war were admitted by the court owing to the fact that on April 27, 1950, the United Kingdom had recognised the State of Israel *de jure* with a reservation that no more than *de facto* recognition was accorded in respect to Israel's sovereignty over the part of Jerusalem occupied by Israel. Johnson, BYB 1953 p. 517 comments this case as follows:

"While it may be true that international law leaves to the belligerent States concerned the regulation of intercourse with the enemy, there are clearly limitations to this principle of which the most obvious concerns the extent to which the courts of neutral countries are obliged to recognize the trading with the enemy legislation of the belligerent States. This legislation must therefore conform ultimately to the principles of international law..." Rosenne 1951 p. 25 rightly observes that "it may be argued that the Security Council, in ordering armistice negotiations, impliedly recognized the existence of a formal state of war between the parties. However, there are several reasons which suggest that this was not the intention of the Security Council. It is well known that the Security Council does not, neither is it so obliged, to deal with situations or disputes from a purely legalistic point of view, and that in reaching its decision it takes into account many other factors, political, psychological, economic, military and so on."

⁵⁶ U.N. Bulletin, vol. V p. 596. Rosenne 1951 p. 13 reasonably declared that the fighting in Palestine "took on the character of full-scale, though localised, war of considerable bitterness and violence in which land, sea and air forces of both sides were fully engaged." To the same effect Garcia REDI 1953 p. 325. Pompe 1953 p. 16 thinks that "the legal judgment of what in U.N. terminology has always carefully been called 'the situation in Palestine' will, after the conclusions of peace-treaties which will end neither a war nor a civil war nor insurgence, become obscured by politico-judicial mists."

⁵⁷ C. Eagleton: *The Case of Hyderabad before the Security Council*. AJIL 1950 pp. 277; Kelsen 1950 pp. 414/15.

Hyderabad and India, and which, unless settled in accordance with international law and justice, is likely to endanger the maintenance of international peace and security.⁵⁸

When the case came before the Security Council on September 16, 1948, Indian forces had invaded and overwhelmed Hyderabad and in the oral presentation of the representative of Hyderabad, appeal was also made under Chapter VII, and especially under Article 39 and 40.⁵⁹ India challenged the right of Hyderabad to appear before and to be heard by the Security Council and invoked the domestic jurisdiction clause under Article 2 par. 7 of the Charter:

Hyderabad is not competent to bring any question before the Security Council; that it is not a State; that it is not independent; that never in all its history did it have the status of independence; that neither in the remote past nor before August, 1947, nor under any declaration made by the United Kingdom, nor under any Act passed by the British Parliament, has it acquired the status of independence which would entitle it to come in its own right to present a case before the Security Council.⁶⁰

It became evident in this case that the mere invocation of the domestic jurisdiction clause does not prevent the Security Council to examine whether a civil war constitutes a threat to the international peace. In the dispute between Hyderabad and India the Security Council finally released the case because it became evident that no global war was apt to arise from the situation and that therefore international peace could not be regarded of being endangered.

D. The war in Korea.⁶¹

On June 25th, 1950, the 38th Parallel was crossed by North Korean forces and hostilities between North and South commenced. The first news received by the outside world of the commencement of hostilities

⁵⁸ Doc. S/986.

⁵⁹ Eagleton AJIL 1950 p. 293.

⁶⁰ Official Records of the Security Council 3rd Year No. 109 pp. 18 ff. quoted from AJIL 1950 p. 280. As to the quality of Hyderabad as a State Sir Alexander Cadogan had informed the Security Council that on August 15, 1947 "the suzerainty of the Crown in the United Kingdom over Hyderabad, and all other Indian States came to an end. None of the powers previously exercised by the Crown was transferred to the Government of the two new Dominions, that is India and Pakistan. Hyderabad has not subsequently acceded to either of those Dominions, but on 29 November 1947 the Nizam entered into a 'standstill' agreement with the Government of India for a period of twelve months." Eagleton AJIL 1950 p. 279.

⁶¹ For a brief account of the post-war history of North and South Korea, and the events leading up to the war in Korea cf. L.C. Green: *Korea and the United Nations*. World Affairs 1950 pp. 414 ff.; Report of the United Nations Commission for Korea, 15 December 1949 to 4 September 1950; as to the legal problems involved in the Korean war see Stone 1954 pp. 228 ff.; Wright: *Collective Security in the Light of the Korean Experience*. AS Proceedings 1951 pp. 165 ff. See above pp. 75 ff.

The end of World War II found the Soviet Union in occupation of the

was a message from the United States Ambassador in Seoul to the State Department to the effect that "North Korean forces invaded Republic of Korea territory at several points this morning... It would appear from the nature of the attack and the manner in which it was launched that it constitutes an all-out offensive against the Republic of Korea". The same evening the North Korean régime declared war against the Republic.⁶²

The Security Council, at its 473rd meeting on June 25, adopted by nine votes to nil — Yugoslavia abstaining and the Soviet Union being absent — a resolution by which it noted 'the armed attack' upon the Republic of Korea by forces from North Korea.⁶³ It was determined that this action constituted a 'breach of the peace' which called for immediate cessation of hostilities. The authorities of North Korea were summoned to withdraw their armed forces and the Members were called upon to "render every assistance to the United Nations in the execution of this resolution and to refrain from giving assistance to the North Korean authorities".

As the North Korean forces did not abide by the Resolution of June 25, the Security Council adopted a resolution two days later on June 27, 1950 recommending that the members of the United Nations "furnish such assistance to the Republic of Korea as may be necessary to repel the armed attack and to restore international peace and security in the area".⁶⁴ Fourteen nations responded to this recommendation by contributing to the United Nations forces in Korea.

The plea of domestic jurisdiction was only raised by the Soviet representative when the Soviet Union resumed attendance at the Security Council in August 1950, its delegate being on the rota to preside during that month. The Soviet representative based this plea on the ground that the armed hostilities in Korea were in the nature of a civil war. Although the Security Council rejected this Soviet argument, it has been observed in legal theory that the assistance which members were recommended to give to the United Nations' enforcement action in

territory of Korea down to the 38th parallel. After the withdrawal of the respective occupying forces, there were left a North Korean Government recognized by the Soviet Union and her allies, and the Republic of South Korea, recognized by most other Members of the United Nations. The General Assembly in its resolutions adopted on December 12, 1948 and October 21, 1949 declared "qu'il a été établi un gouvernement légitime (le Gouvernement de la République de Corée) qui exerce effectivement son autorité et sa juridiction sur la partie de la Corée où la Commission temporaire a été en mesure de procéder à des observations et à des consultations et dans laquelle réside la grande majorité de la population d'ensemble de la Corée". Report of the United Nations Commission for Korea, 1949/I p. 3. The United Nations Commission which had supervised the election had not been admitted to the Korea north-wards of the 38th parallel, where the North Korean Government retained its authority. Stone 1954 p. 228; see also Komarnicki RdC 1952 pp. 493 ff.

⁶² Green, *World Affairs* 1950 p. 426, Taubenfeld *AJIL* 1953 pp. 390 ff.

⁶³ Doc. S/1501; U.N.S.C. Official Records 5th Year No. 15 at 18.

⁶⁴ Doc. S/1511, at the 474th meeting, with the Soviet Union absent and Egypt and India abstaining.

Korea could not be regarded as constituting 'genuine peace enforcement' under Chapter VII of the Charter.⁶⁵

Paragraph 4. Police action or war of sanction?

Since the days of the League, when centralization of military forces for the elimination of threats to international peace was first achieved, a certain doctrinal interest was propagated by publicists and quasi-writers on international law to abrogate the terminology of war and substitute for an eventual war of sanction the idea of 'police action'. That image has been drawn ever since by analogy from municipal law.⁶⁶

⁶⁵ Cf. H. Kelsen: *Tendances récentes du droit des Nations Unies*. Revue Internationale d'Histoire Politique et Constitutionnelle. 1952 pp. 40/41. Stone 1954 p. 230 n. 12 holds the view that "this problem is a highly artificial one arising out of the parlous condition of the law of recognition... The Korean war in the Soviet view did not involve *international* peace since the Soviet Union did not recognize the State of South Korea. On the other hand, the Statehood of South Korea was recognized by other States as well as by the United Nations itself; and that of North Korea was not so recognized. Insofar, however, as the Council's action on Korea purported to be based on Article 39, the finding of a breach of the peace (which to be relevant under Chapter VII had to be of *international* peace) implied a recognition at least of the belligerent status of North Korea by the Member States concurring and by the Security Council itself. Professor Kelsen suggests that this implication might have been avoided by the Council finding a 'threat to the peace' instead of "a breach of the peace". The author does not follow this reasoning."

Wright AS Proceeding 1951 p. 171 observed with regard to the Korean war "that experience suggests that United Nations organs should make precise and authoritative declarations of policy concerning the scope and purpose of collective measures; should control whatever military action is undertaken within the intention of such declarations; and should conduct careful negotiations to prevent policing action from spreading into general war".

⁶⁶ C. Schmitt: *Die Wendung zum diskriminierenden Kriegsbegriff*. 1938 p. 48 described this tendency as follows: "Bringt die 'Kollektivierung' wirklich einen echten Bund zustande, so kommt diese ganze Logik zum Zuge, das heisst, innerhalb des Bundes wird nicht mehr zwischen gerechten und ungerechten Kriegen entschieden, vielmehr gibt es überhaupt keine Kriege mehr, sondern nur noch Exekutionen. 'Erlaubte Kriege' sind noch denkbar, aber nur als ungefährliche Kleinkriege, als *dog fights* wie Fischer Williams sagt. Sie können innerhalb des Bundes toleriert werden, wie zum Beispiel auch die Ordnung des modernen Staates Duelle tolerieren kann. Ausserhalb des Bundes dagegen sind noch Kriege möglich; diese fallen aber unter den alten, nichtdiskriminierenden Kriegsbegriff."

This tendency must not be confused with the legal theory according to which military enforcement measures of the League do not constitute a *recourse* to war. This theory which does not contradict the interpretation of military enforcement measures in terms of war, was expressly confirmed by the League of Nations in 1931. The 12th Assembly accepted the standpoint that if the Council of the League prescribed military measures for the sanctioning of its decisions, this would assume the character of social defence in perfect harmony with the principles of the Covenant. Records of the 12th Assembly, 1931, Plenary p. 222 quoted from Eagleton 1933 p. 245. With regard to the Covenant Wehberg had concluded in 1934 that "une force de Police internationale vraiment permanente n'est pas prévue dans le Pacte de la Société des Nations". *La Police internationale*. RdC 1934/II p. 108. Cf. Guggenheim Traité II p. 299.

As the centralization of executory forces has been considerably strengthened in the Charter, it has been increasingly asserted that the executive machinery for the outlawing of war must be regarded as being of a structure and efficiency similar to the executive administration of a State. Hence it is said that the classical war terminology has lost its *raison d'être* and that enforcement actions under the United Nations will be in the true nature of a police action.⁶⁷

Apart from certain legalistic theorism, however, it has become abundantly evident under the League as well as under the United Nations that its military enforcement actions, if they were resisted by the charter-breaking State, necessarily consisted of armed contests prolonged in duration and precarious in progress and outcome. These circumstances are the very characteristics and concomitants of war.⁶⁸

Three aspects must particularly be considered due to the fact that enforcement action of the United Nations legally constitutes a war of sanction:

⁶⁷ Yet "the popular concept of a powerful international police force, analogous to domestic police, is not as simple or as satisfactory as many of its advocates think that it would be. It implies, in the first place, a much stronger governmental system than the United Nations was planned to be". Eagleton: *International Government*. 1948 pp. 446/7. Tucker ILQ 1951 p. 24 remarks rightly that any such interpretation must start out from the assumption that "the Charter can operate as originally intended, that the actions of the Security Council will not be paralysed by the use of the veto — an assumption which now appears highly improbable. But even if this assumption is made it may be doubted whether the enforcement actions provided for in the Charter have the character of true sanctions. It is, of course, not the lack of centralization in the Charter that permits this doubt but the almost unlimited discretion given to the Security Council".

Moreover, the analogy of military enforcement measures under the Charter and police action in municipal law remains precarious inasmuch as war is possible to arise even in municipal law if an insurrection develops into a civil war. To that extent Reves is right when he considers only the occurrence of civil wars in a World State. Cf. J. Lorimer: *The Institute of the Law of Nations*. 1884 vol. II pp. 184, 286; Wright AJIL 1953 pp. 366, 376; Brandweiner 1954 pp. 225 ff.

⁶⁸ Garcia REDI 1953 p. 354. Lauterpacht BYB 1953 p. 241 rightly points out that "the resulting situation is a clear indication of the fact that organized international society has failed not only to prevent hostilities but also to ensure that swift and overwhelming suppression of the insurrection against the international order which alone can qualify it as police in the ordinary sense of that term".

Many writers reject the use of the term 'war' under the Charter because they erroneously identify its meaning with an inherent right to resort to war. In this sense Calogeropoulos 1950 p. 78: "La fidélité à la notion classique du mot 'guerre' telle qu'elle a été admise par le droit international est aujourd'hui inadmissible dans les cadres de l'organisation contemporaine de la société internationale". Others, like Eagleton, attempt to eliminate the term 'war' for ideological reasons: "If the Security Council of the UN were to call upon Members for forces and employ them against an aggressor, this would be something different from war. If one state should, without authorization from the UN, use force against another, this might be war. The status of action undertaken under Article 51 of the Charter is as yet uncertain." Eagleton 1948 p. 397 n. 11.

- (1) the doctrine concerning the elements which constitute war,
- (2) the doctrine of *bellum justum positivum* under the Charter,
- (3) the principles concerning the application of the laws of war in general and of the laws of warfare in particular.

1. *The constitutive elements of a war of sanction under the Charter.*

A war of sanction under the Charter may be in the nature of either a formal war or a material war. Its qualification in this respect depends in the first place on the degree of effectiveness given to the United Nations in every particular case. According to the original spirit of the Charter only material wars could take place in the course of its military enforcement measures. Any such material war, however, could not be initiated by the enforcement action of the UN military forces but only by the armed resistance of the defaulting State. In other words military enforcements actions of the United Nations do not constitute *per se* an act of war which is liable to be interpreted as recourse to war.⁶⁹ It follows from this legal principle that recourse to material war will be 'committed' by the defaulting State in the event that the latter resists UN military enforcement action by force. Any such material war of sanction, however, does not oblige the sanctioning powers to declare war, although the whole range of military and economic warfare measures may be applied by them.⁷⁰

In fact, however, the elimination of formal war under the Charter has not been completely achieved. It is true that during the hostilities arising out of the invasion of South Korea by North Korea in 1950 there was no provision on the part of the United Nations to refer to the contest as war in the formal sense. The participation of the individual States in the United Nations' action, however, could not legally be said to be strictly within the realm of the enforcement measures under Chapter VII.⁷¹ Express and formal statements which

⁶⁹ "Preventive or enforcement action by these forces upon the orders of the Security Council would not be an act of war but would be international action for the preservation of the peace and for the purpose of preventing war." US Senate 79th Congress, First Session, Report No. 717, cf. Eagleton 1948 p. 392; Jessup *Acta Scandinavica* 1953 pp. 22/23.

⁷⁰ Castrén 1954 p. 436 apparently considers both material and formal wars when he observes: "But even resort to such acts as these need not lead to war unless the Security Council expressly provides that member States must declare war upon the Power subjected to measures of enforcement and such declaration is in fact issued, or the Power concerned takes counter measures intended as acts of war." Cf. C. Fenwick: *The Atlantic Pact*. AJIL 1949 p. 314: "Once the United States accepted the obligation of the Charter of the United Nations, the power of Congress to declare war became practically subordinated to the vote of the United States member of the Security Council that armed forces are needed to maintain international peace and security." Cf. Rowson BYB 1946 p. 352; Guggenheim *Traité* II p. 422 n. 1, Potter AJIL 1953 pp. 273/74.

⁷¹ Suffice it to remind that the position of the USSR was that the United States was fighting an ordinary war of aggression in Korea. Cf. Taubenfeld AJIL 1951 p. 678; Komarnicki *Grotius Transactions* 1953 pp. 83 ff. at p. 85.

were made for political convenience by some of the participating States to the effect that their military contribution did not constitute war would be superfluous if they did not try to cover a new situation where the possibility of resort to war in the formal sense reappeared and remained legally arguable.⁷²

II. The doctrine of "*bellum justum positivum*" is a legal corollary to the war of sanction under the Charter.

Enforcement actions of the United Nations, if they lead up to war, must necessarily be considered in the light of a *bellum justum positivum* which, however, is not a return to the main characteristics of the medieval doctrine of *bellum justum*, but expresses the concept of *bellum legale* in the sense of positive law.⁷³ Owing to the fact that international law will henceforth be sanctioned in the last resort by the community of the United Nations, it has become true that

whether or not international law can be considered as true law depends upon whether it is possible to interpret international law in the sense of theory of *bellum justum*, whether it is possible to assume that, according to general international law, war is in principle forbidden, being permitted only as a sanction, that is as a reaction against a delict.⁷⁴

⁷² Cf. Taubenfeld AJIL 1951 pp. 672/73.

⁷³ Cf. J. Kunz: *Bellum justum and bellum legale*. AJIL 1951 pp. 528 ff. p. 532. The contracting powers to the London Agreement which provided for a military trial of German officials after the end of World War II claimed to act in accordance with positive rules relative to just and unjust war. Yet the indictment of the I.M.T. rested on a theory of *bellum justum* which was derived from the Pact of Paris and was substantiated by principles of the medieval doctrine of *bellum justum*. Cf. Tucker ILQ 1951 pp. 22/23; see also Brown Rev. I. Croix Rouge 1934 p. 462. M. Bourquin: *Grotius est-il le père du droit des gens?* 1948 p. 91 thinks that the Charter constitutes in a sense a revival of the classical doctrine of *bellum justum*. Says that author: "La Charte des Nations Unies, comme le Pacte de la Société des Nations, établit, en effet, une distinction fondamentale entre les belligérants, suivant qu'ils ont respecté ou non les règles de la Sécurité Collective. L'Etat qui viole ces règles fait une guerre illicite et les membres de l'organisation s'engagent à unir contre lui leurs efforts."

Sans doute ce système diffère-t-il, à maints égards, de celui du *Bellum Justum*. Il en diffère notamment en ce sens que, pour lui, ce ne sont plus les causes de la guerre qui constituent le facteur décisif, mais bien la rupture de la paix. On distingue les belligérants, non d'après la justice intrinsèque de leurs prétentions, mais en tenant compte du fait que l'un d'eux a pris l'initiative des hostilités, qu'il est l'agresseur, tandis que son adversaire ne fait que riposter à l'attaque dont il est l'objet. N'empêche que les affinités sont évidentes. La doctrine du *Bellum Justum* réapparaît donc sous un nouveau visage, dans le droit positif de nos jours."

⁷⁴ H. Kelsen: *Law and Peace in International Relations*. 1942 p. 52 and *General Theory of Law and State*. 1945 p. 331. Guggenheim Lehrbuch II pp. 590 ff. See also Kunz AJIL 1951 p. 529; Tucker ILQ 1951 p. 17 n. 10. Cf. Sofronie 1934 p. 40; Wehberg FW 1938 p. 133 with reference to C. van Vollenhoven.

The doctrine of *bellum justum positivum* under the Charter, which is the legal corollary to the fact that sanctions of the Charter may be enforced even by way of war, is an instrument to interpret the positive law. It constitutes an essential element in the ideology of the Charter which is to save "succeeding generations from the scourge" of international war on a large scale. The doctrine of *bellum justum positivum* rests on the fact that

The first purpose in Article 1 is not to achieve and maintain justice, but to "maintain international peace and security". Again, we are faced with the antinomy between the two juridical values of security and justice. Security is the lower, but most basic value... First to establish security is the philosophy of recent developments, in the conviction that security is the indispensable pre-condition of later achieving justice.⁷⁵

The Charter which distinguishes between legal and illegal use of force is primarily concerned with the legality of its cause and not with its intrinsic justice. According to the doctrine of *bellum justum positivum* under the Charter, a just war is a war which is eventually waged in pursuance of military enforcement measures provided that the latter have been expressly authorized by the competent organ of the United Nations. As a result, even in the event of the aggressor having a just cause in the medieval sense (that is, based on international ethics, on positive claims and on natural law), the war of sanction which may be waged against him in accordance with the rules and procedure of the Charter will constitute a *bellum justum positivum* on the part of the military forces which take part in the UN enforcement action and an unjust war on the part of those who wage war in disobedience of the United Nations' decisions.⁷⁶

III. *The application of the laws of war under the Charter.*

Any examination of the binding force of the laws of war under the Charter is to be effected from two viewpoints: (1) of its compatibility with the character of the Charter as a *jus contra bellum*; (2) of the modern concept of discrimination between aggressor and defender.

The general abolition of the laws of war has mainly been admitted on the following two principles which are well founded in juridical logic: on the principle of *ex injuria jus non oritur*⁷⁷ and on the

⁷⁵ Kunz AJIL 1951 p. 533.

⁷⁶ Eagleton 1948 p. 44 rightly remarks that the Security Council is bound by no definition of aggression and by no legal criteria in its determination with regard to a situation before it. "Nor is it limited to situations of actual war or use of force or to naming a particular state as an aggressor before it can take action; it may describe a situation in which force has not appeared as a threat to the peace, and it may take action against all states involved rather than against a convicted violator."

⁷⁷ See above p. 121.

argument that if war is outlawed there can no longer be any law of war.⁷⁸ Yet in practice it has become evident that there is no contradiction between the utmost effort to prevent the outbreak of war means of an anti-war agency and the readiness to regulate large-scale fighting by the rules of war.⁷⁹

The tendency of substituting the notion of 'war of sanction' by that of 'police action' was another way of declaring that the military enforcement measures of the United Nations are not submitted to the rule of the laws of war. There is in fact a superficial attractiveness in the proposition that "the use of force by the United Nations to restrain aggression is of a different nature from war-making by a State" and that therefore hostilities conducted for the purpose of collective enforcement of peace should be governed by a code of rules different from those obtaining in ordinary wars.⁸⁰

It is a mistake to assume that the acceptance of the concept of collective security dispenses with the protection of the laws of war for those who are active participants in the armed measures of sanction. None of the Articles of the United Nations Charter or any special agreement under its direction could be said to modify considerably the historic provisions of the international law of warfare. Moreover, the maintenance of the law of war is essential for the law of war crimes. A situation cannot be called legal, in which both belligerent groups will do what they like, and then the victors "will try the vanquished for having committed crimes determined unilaterally and with retroactive force by the victors".⁸¹

The discriminating effect of the concept of war under the Charter is due to the fact that in a material war of sanction the adverse belligerent to the UN forces has previously been found guilty of aggression or breach of the peace while the UN action remains by definition a defence action for the re-establishment of international peace. Although, in

⁷⁸ At the first session of the International Law Commission in 1949 it was suggested that "war having been outlawed, the regulation of its conduct had ceased to be relevant. The majority of the Commission declared itself opposed to the study of the problem at the present stage. It was considered that... public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the UN for maintaining peace". Quoted from Kunz AJIL 1951 p. 43.

⁷⁹ Kunz AJIL 1951 p. 57; cf. Baxter BYB 1952 p. 359; Jessup 1948 pp. 188/89; Merle 1949 p. 152.

⁸⁰ In the Korean War Mr. Malik, the Soviet Delegate, declared before the Security Council that Art. 25 of the Hague Convention IV and Art. 1 of the Hague Convention IX "are in full force today and the armed forces of the United States are obliged to observe them". Official Records 497th Meeting, Sept. 7, 1950, p. 9. Cf. Pravo 1950 No. 10 p. 2; Baxter BYB 1952 p. 359 n. 3; Lauterpacht BYB 1953 pp. 220, 223 n. 1. For the legal controversy upon the application of the Art. 25 of Hague Convention IV see Garcia REDI 1953 p. 328, and upon the application of the laws of war and neutrality in general in the Korean War see Taubenfeld AJIL 1953 pp. 329 ff.

⁸¹ Kelsen ILQ 1947 p. 171.

principle, the binding force of the law of war has been maintained after the constitution of the United Nations Charter, its scope of application has been modified to the extent that the discriminating effect of the modern concept of war is of legal relevancy. A distinction must therefore be drawn between those laws which are applicable to all political entities engaged in hostilities, no matter whether their action has a legal character of defence, enforcement, or aggression, whether it is material war or formal war.⁸² The universal application which may be called *minimum standard* of applying the law of war is characterized by its direct relation with the conduct of hostilities; it is determined by compelling reasons of humanity and military reciprocity.

The phenomenon of war does not fully admit of treatment in accordance with canons of logic. Banished as a legal institution, war now remains an event calling for legal regulation for the sake of humanity and the dignity of man. Legal regulation is also required to safeguard the possibility of some measure of voluntary collaboration between the belligerents after the war. At the same time, these considerations are not inconsistent with giving effect, within a limited sphere and largely after the war, to the principle that an unlawful act ought not to become a source of benefit and title to the wrongdoer.⁸³

The 'minimum standard set' of the laws of war which is compulsory in any material war whatsoever is comprised by the rules defining the rights of individuals, such as those dealing with the treatment of prisoners of war; the treatment of the sick and the wounded, the immunities of parliamentaries and the signs of surrender; the procedural rights of persons accused of traditional war crimes, spying, or war

⁸² The American Society of International Law declared in 1952 in a Committee composed of W.J. Bivens, L.M. Goodrich, H. Kelsen, J. Kunz, L.B. Sohn and Clyde Eagleton that "the use of force by the United Nations to restrain aggression is of a different nature from war-making by a state. This we may say without deciding whether United Nations enforcement action is war, police enforcement of criminal law, or *sui generis* ... The United Nations should not feel bound by all the laws of war, but should select such of the laws as may seem to fit its purposes (e.g., prisoners of war, belligerent occupation), adding such others as may be needed, and rejecting those which seem incompatible with its purposes". AS Proceeding 1952 pp. 216 ff.; cf. Wright AJIL 1953 pp. 374, 376; Taubenfeld AJIL 1951 p. 674. Lauterpacht BYB 1953 p. 241 observes that there is "a distinct element of artificiality and over-simplification in the suggestion, which has been frequently made in this connexion in the course of hostilities in Korea, that the forces of the United Nations should be entitled to all the rights of war but should not be bound by all of them. Cf. Brantweiner 1954 pp. 225 ff.

⁸³ Lauterpacht 1953 p. 240; see also Kunz AJIL 1951 pp. 60/61.

treason; the protection of soldiers against methods or weapons causing unnecessary suffering.⁸⁴

The difference between the legal position of the aggressor and that of the defender with regard to the laws of war concerns above all the law of neutrality, the capacity of acquiring title to property and of claiming reparation.

The aggressor could not establish a valid blockade; no question of contraband could arise in relation to goods destined for delivery to any state that was engaged in using authorized and therefore lawful force; the aggressor would enjoy no right of visit and search; its captures and the decisions of its Prize Courts, if indeed any were set up, would be invalid; its ships could claim no right to re-fuel or repair in any ports.⁸⁵ In addition, the aggressor is denied to acquire title to property nor does he enjoy any right of requisition, sequestration and confiscation of enemy property in occupied territory in that specific sense that he may not refuse claims for reparation on the grounds of military necessity.⁸⁶

⁸⁴ Cf. Q. Wright: *The Outlawry of War and the Laws of War*. AJIL 1953 pp. 373/75. Lauterpacht BYB 1953 p. 212 observes that it does not matter in this context that these rules have been observed "mainly for the reason that they did not seriously interfere with the achievement of the major purpose of the war. The decisive fact is that they have served to a considerable extent the purpose of preventing or diminishing human suffering, and that they would in fact cease to operate if their operation were made dependent upon the legality of the war on the one belligerent group of belligerents ... It is probably true that the humanitarian sphere constitutes the bulk of the law of war". See also at p. 239 and BYB 1952 pp. 363/65; cf. *La révision du droit de la guerre*. Annuaire 1954 pp. 555 ff.

It may be added that the prevailing opinions in the Communist States sustain the maintenance of the laws of war. See for instance the Polish Professor Muskat Neue Justiz 1955 p. 615: "Die Bestimmungen der Genfer Konvention strafen diejenigen reaktionären Vertreter der Doktrin des Völkerrechts Lügen, die behaupten, dass das Kriegsrecht nicht mehr zeitgemäss sei. Die Reaktionäre begründen dies entweder vom Standpunkt des Nihilismus im Namen des verbrecherischen Grundsatzes von der Notwendigkeit des Krieges, die alle Mittel als zulässig anerkennt, die zur Vernichtung des Gegners und seiner Eroberung durch die Massnahmen des totalen Krieges führen, oder sie begründen dies vom Standpunkt einer tendenziösen und falschen Interpretation der UN Charter." See also B. Meissner: *Sowjetunion und Haager Landkriegsordnung*. Osteuroparecht 1955 pp. 96 ff.

⁸⁵ Dehn RepILA 1946 p. 45; cf. Merle 1949 p. 152; Baxter BYB 1952 p. 359; Wright AJIL 1953 pp. 371, 374. Lauterpacht BYB 1953 p. 239 observes: "There is room in other spheres, not directly connected with the conduct of war, for giving effect to the principle that a State waging an unlawful war is not entitled, after the war, to invoke rules of customary international law which disregard the vitiating effect of duress in the conclusion of treaties; which recognize title acquired by conquest; which absolve the belligerent from reparation for damage caused by lawful acts of warfare; which give it the right to regard as dissolved treaties concluded prior to the outbreak of the war; and which render it — and the individuals responsible for its actions — immune from criminal responsibility for the initiation of a war of aggression."

⁸⁶ The opportunity for refusing these laws of war to the aggressor necessarily depends on the defeat of the latter and consequently on the successful operation of collective security.

Yet emphasis is to be given to the legal fact that a belligerent State can claim the benefits flowing from that discrimination only in the event that it is engaged in enforcement action authorized and directed by the United Nations.⁸⁷ As long as States act in their individual capacity against the aggressor no claim of discrimination could be made, for the latter rests on and is also limited by the Charter provisions requiring Members of the United Nations to "refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action".

⁸⁷ In such an event qualified neutral states, no matter whether Members or non-Members of the UN, are declared to be prevented from insisting on such a right and duty as that requiring it to fire upon international aircraft flying over its territory, as the Swiss considered it their duty in the two World Wars. Taubenfeld AJIL 1953 p. 396; supported by Grob 1949 p. 165; P. Jessup: *International Law of the Air: Neutral Rights and Duties*. AS Proceeding 1938 p. 89.

CONCLUSION

The results of our investigation into the contemporary State practice reveal that whereas the traditional legal system with regard to war is still valid, the relevance of the social phenomenon 'war' in the province of international law has been considerably widened. The transposition of this fact into legal terms has been expressed by the broadening of the state-of-war concept into a concept of war in the formal and material senses. This evolution has been essentially fostered by the following political and legal tendencies:

(1) The outlawry of war which attempted to outlaw not only the so-called 'war in the legal sense' but also *de facto* war;

(2) The attempts to assure for all armed conflicts which are *de facto* wars the compulsory application of those laws of war which reduce the unnecessary sufferings of combatants in their individual capacity;

(3) The transformation of the international society from an anarchy of sovereign States into a federal society of collective security. The integral maintenance of the traditional state of neutrality necessarily became incompatible in all those events where that federal society proceeded to the execution of genuine war of sanctions;

(4) The identical treatment accorded to international war and civil war in the event that they constitute a threat to international peace.

The traditional state-of-war doctrine which prevailed throughout the 19th century was founded on the premise that war 'in the sense of international law' is definable and consequently is *a priori* discernable from all other forms of sociological *de facto* war which were called military reprisal, armed intervention or international police action. It is that hypothesis which almost exclusively featured in the past legal investigations into the concept of war. As a consequence, the latter was generally dealt with '*in abstracto*' and in no way conceived as being related to the application of the laws of war. War being (under the state-of-war doctrine) only what States wanted to admit as 'war', the legal monographs on the concept of war demonstrated above all the ingenuity of the lawyer to convincingly fashion a coherent system which would, in spite of unsuperable difficulties, somehow seek to reconcile international law as a system of law with the facts of international life.

The recognition of material war in the province of international law in addition to the formal state of war, has profoundly altered the legal approach to the concept of war. First of all, the latter henceforth hinges mainly on the selective application of the laws on war and no longer

admits of being considered *in abstracto*. This is because the application of a certain number of the fundamental laws of warfare has become independent from the consent of the belligerents and instead have been related to certain facts. From the legal point of view, the compulsory application of these laws of warfare, determined by facts and independent from the consent of the belligerents, can be regarded as contributing to general evolution in international society from anarchy to the rule of law. For the restatement of the concept of war, however, it does not matter whether in armed conflicts to come we can or cannot count upon any return to the real observance of the most important laws of war. The only important thing for any legal investigation into the contemporary concept of war is to know whether or not the social phenomenon 'war' has retained its relevance in international law. The affirmative conclusion to this preliminary research has been reached in the first part of this work. On the basis of this conclusion, any oft-heard blame upon the lawyer, in his effort to restate the concept of war, for dealing with unrealistic aspects of modern international life, is without concern. Suffice it to add that it is precisely the function of law to deal with legal technicalities provided that the lawyer is called upon to submit the facts to the law. As to the laws on war, this submission may take place in the event that a jurisculte has to advise and inform his government, that a judge of an international court must find upon the legitimacy of certain acts of armed coercion or that a municipal court is bound in its findings by international law or looks to support from it. The legal potentiality of the Nuremberg Trials is evidence enough that the submission of facts to the laws on war by an intergovernmental Court is far from being any longer an idea of 'wishful thinking'.

Another impact of the concept of war in the formal and material senses is that the former dichotomy with regard to armed force, i.e., war and measures short of war, has nowadays changed into a trichotomy, namely formal war, material war and armed force short of war. That is, acts of force which constitute neither formal nor material war are not productive of the compulsory application of the laws of warfare.

Since the United Nations Charter, doctrinal attempts have been made to eliminate the concept of war from the province of international law and consequently to confer arbitrary power on the UN forces as far as their application of the laws of war in wars of sanction is concerned. It can be reasonably said that not only did all these attempts bitterly fail to produce the desired effect on the *lex lata* concerning war but they were even ignored as 'sublime legal nonsense' by the UN practice in the field. Diametrically opposed to the predictions and predilections of certain erudite writers on international law, the United Nations, there is no doubt, have equally rediscovered the political utility and the legal advantages of 'neutrality' in an international society which is divided into 'ideological' camps.

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